No. (1)

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1999

ORANGE COUNTY DEPARTMENT OF PROBATION,

Petitioner,

v.

ROBERT WARNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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A. Do the spiritual elements of Alcoholics Anonymous fall within the definition of "religion" for Establishment Clause purposes?

B. Did the court below err in completely failing to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and progeny to determine whether a probation department's recommendation to a judge that a convicted substance abuser attend Alcoholics Anonymous as a required condition of probation violates the Establishment Clause?

II Does The Imposition By A Sentencing Judge Of A Special Condition Of Probation Recommended By A Probation Department Constitute A Superseding Cause Which Relieves A Municipality Of Liability For Damages Under 42 U.S.C. Section 1983?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the April 19, 1999 decision and order of the Court of Appeals for the Second Circuit. *Warner v. Orange County Department of Probation*, 173 F.3d 120 (2d Cir.1999) ("*Warner IV*"). That decision, *inter alia*, reinstated the Second Circuit's previously amended and vacated decision, *Warner v. Orange County Department of Probation*,115 F.3d 1068 (2d Cir. 1996) ("*Warner I*"), holding that a municipality is liable under 42 U.S.C. Section1983 for merely recommending to a sentencing judge that a three-time DWI offender's probation be conditioned upon attendance at Alcoholics Anonymous ("A.A.").

The Warner court held that A.A. is a "religion" and that the mere recommendation made to the sentencing judge by Orange County Probation Department ("Orange County") violated the Establishment Clause. In finding Orange County liable, the court refused to find that the judicial act of formally imposing the "offensive" condition as part of the sentence constituted a superseding cause or entitled Orange County to some form of immunity. The court also refused to find that Warner's initial voluntary choice to attend A.A. prior to being sentenced, his failure to object to the condition at the time of sentencing and his failure to appeal from any aspect of his sentence constituted a waiver or forfeiture, or was, itself, the proximate cause of any constitutional injury.

Together, these decisions have wide-spread ramifications vis-a-vis Establishment Clause doctrine for substance abusers, criminal advocates, sentencing judges, probation departments and penal institutions. Under New York law, the exclusive authority to pronounce a sentence and to direct conditions of probation, including with respect to participation in alcohol or substance abuse programs, is exclusively vested in the judiciary. N.Y. Penal Law §65.10 (McKinney's 1996 & Supp. 1999). The court may not delegate this responsibility. *People ex rel. Perry v. Cassidy*, 13 A.D.2d 556, 257 N.Y.S.2d 228, 229 (3d Dept. 1965). If directed to do so by a judge, a local probation department has a statutory responsibility to conduct a presentence investigation and provide the court with a presentence

report. N.Y. Crim. Proc. Law §390.20(1). It is the sentencing judge, however, who must determine how much, if any, of the presentence report to adopt. *People of the State of New York v. Fuller*, 57 N.Y.2d 152, 455 N.Y.S.2d 253 (1982).

The *Warner* cases present this Court with a unique opportunity to clarify that which is generally acknowledged to be a confusing and difficult area of constitutional jurisprudence. The threshold issue in this case is whether the Establishment Clause has been violated when, in the context of administering criminal justice, government interacts, however minimally, with privately administered social programs which may have as one component a spiritual element. However, the cases also raise important questions about the applicability of tort law principals to Civil Rights cases under 42 U.S.C. Section 1983.

The confusion generated by previous United States Supreme Court decisions has resulted in differing approaches by the lower courts, which have been unable to agree on the proper standards to apply when these types of claims are raised under the Establishment Clause, as opposed to the Free Exercise Clause. Some courts have rigidly applied the formalistic and absolute "coercion" test set forth in *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*"), without any further analysis, to find an Establishment Clause violation when convicted substance abusers are paroled on the condition that they attend A.A. On the other hand, courts which have applied *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*") and progeny have, under the same circumstances, found no constitutional violation.

By relying too heavily, or exclusively upon *Lee*, rather than applying the three-part test articulated in *Lemon* ("Lemon Test"), or some formulation of that test, the *Warner* majority reached the conclusion that merely recommending as a condition of probation continued attendance at A.A. meetings violates the Establishment Clause and subjects a municipality to damages. Moreover, as Chief Judge Winter commented, the *Warner* majority's analysis of the superseding acts undertaken by the judiciary and Warner's own acts and omissions:

"[T]ransports tort doctrine of proximate cause and foreseeability drawn from the law of negligence to the judicial process. In so doing, it fails to give any recognition to the more appropriate rules governing intentional torts, to the power of a party to a court proceeding to avoid harm by raising objections and taking appeals, or to the role of the judge as an independent decision-maker."

See Appendix (hereinafter ("[page number]a") (51a) (Winter, J.,(now C.J.), dissenting).

Opinions and Orders Below

1. *People of the State of New York v. Warner*, (Town of Woodbury Justice Court, September 11, 1992) (reproduced herein at Appendix "H") (dismissing as moot *Warner's* motion seeking to declare a condition of probation requiring attendance at A.A. an Establishment clause violation because Warner had been accommodated with alternative rehabilitation program);
2. *Warner v. Orange County Dept. of Probation*, 827 F. Supp. 261 (S.D.N.Y. 1993) (reproduced herein at Appendix "G") (denying Orange County's motion to dismiss on grounds of mootness, collateral estoppel, and failure to state an Establishment Clause claim);
3. *Warner v. Orange County Dept. of Probation*, 870 F. Supp. 69 (S.D.N.Y. 1994) ("*Warner I*") (reproduced herein at Appendix "F") (finding under Establishment Clause that Orange County is liable for making recommendation to sentencing judge that repeat DWI offender attend A.A. meetings as a condition of probation and awarding nominal damages and attorney fees);
4. *Warner v. Orange County Dept. of Probation*, 95 F.3d 202 (2d Cir. September 9, 1996) (reproduced herein at Appendix "E") (*affirming* District Court decision), *withdrawn* from reporter pending Petition for Rehearing and Suggestion for Rehearing En Banc), *amended by*, 115 F.3d 1068 (2d Cir. May 14, 1996) ("*Warner II*") (reproduced herein at Appendix "D") (*affirming*

District Court decision), *vacated and remanded by* Order dated May 14, 1996 (set forth within amended decision at Appendix "D") (*vacating* both September 9, and May 14, 1996 decisions, remanding to District Court on narrow issues of consent and waiver and denying Petition for Rehearing as moot). *See also* Order dated May 28, 1997 (reproduced herein at Appendix "C") confirming that both original and amended decisions had been vacated;

5. *Warner v. Orange County Department of Probation*, 968 F. Supp. 917 (S.D.N.Y. 1997) ("*Warner III*") (reproduced herein at Appendix "B") (holding on remand that Warner neither consented to condition of probation nor waived right to claim violation under Section 1983);
6. *Warner v. Orange County Dept. of Probation*, 173 F.3d 120 (2d Cir. 1999) ("*Warner IV*") (reproduced herein at Appendix "A") (*affirming* District Court findings with respect to consent and waiver and reinstating amended decision, *Warner v. Orange County Department of Probation*, 115 F.3d 1068 (2d Cir. 1997) (previously identified as "*Warner II*").

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was entered on April 19, 1999 and this petition is timely filed. This Court's jurisdiction is grounded in 28 U.S.C. Section 1254.

Constitutional Provisions Involved

The constitutional provision at issue is the Establishment Clause contained in the First Amendment to the United States Constitution, applicable to the states by the Fourteenth Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

Statement of the Case

The facts in this case are not in dispute. In November 1990, Warner was arrested and pled guilty to his third alcohol-related driving offense. Prior to being sentenced, Warner voluntarily began attending meetings sponsored by Alcoholics Anonymous ("A.A."). He did so upon the advice of his lawyer who advised him that the sentencing court might be more lenient if he demonstrated that he was voluntarily pursuing a program of rehabilitation.

The sentencing court ordered Orange County Department of Probation ("Orange County") to conduct a presentence investigation and prepare a presentence report. In its report, Orange County recommended that Warner be allowed probation, rather than be incarcerated, with the "special" condition that he continue his attendance at A.A. meetings.

The sentencing judge, pursuant to his statutory obligation to independently determine the appropriate sentence, imposed each of the conditions recommended by Orange County. Warner executed in December 1990 as part of the sentencing process a document entitled, "Order and Conditions of Probation," which included the "special condition" that he attend A.A. meetings. By so doing, he acknowledged that all of the conditions had been "fully explained" and agreed to "abide by them" while on probation. (See Joint Appendix filed in Second Circuit ("JA.") at p. 21a)

Warner did not raise any religious objections despite his previous voluntary attendance at the four (4) or five (5) A.A. meetings (which were held at churches and each of which began and ended with a prayer) at the time the sentence was imposed. Nor did he timely appeal from any aspect of the sentence imposed. However, beginning in January 1991, Warner began to complain to his probation officer about the spiritual nature of the A.A. meetings. Because the conditions of probation had been court-ordered, Warner's probation officer could not alter or remove the condition.

In August 1992, some two years into his three-year probationary period, Warner sought counsel and filed a motion seeking to be relieved

from any continued obligation to attend A.A. meetings because he claimed he was offended, as an atheist, by their spiritual nature. Warner was quickly accommodated with a non-religious counseling program, so the motion was denied on mootness grounds.[1]

Warner thereafter sued Orange County in federal court under 42 U.S.C. Section 1983 alleging that the mere recommendation to the sentencing judge that he be required to attend A.A. as a condition of probation violated his rights under the Establishment Clause of the First Amendment.[2] Warner did not raise any Free Exercise claim.

After a bench trial, the Honorable Gerard L. Goettel of the United States District Court for the Southern District of New York, applying *Lee*, found that compelling Warner to attend the A.A. program violated the Establishment Clause.[3] *See, Warner v. Orange County Department of Probation*, 870 F. Supp. 69 (S.D.N.Y. 1994) ("*Warner I*") (87a-96a at 95a). He further determined that Orange County was liable for the constitutional injury, even though he acknowledged that it was the sentencing judge, not Orange County, which had actually imposed the condition of probation. (92a) Indeed, the sentencing judge could not delegate his legal obligation to impose the probation conditions. (29a) Notwithstanding his finding of unconstitutionality, Judge Goettel awarded to Warner only nominal damages of one dollar, finding his claims of injury "unconvincing." (96a)

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[1] Warner complained to the sentencing judge after being relieved of the "offensive" condition of attendance at A.A. (which was free) because he would be required to spend his own money for treatment at a private facility. Judge Levinson rejected Warner's complaints. (116a)

[2] Jurisdiction in the United States District Court for the Southern District of New York was conferred by 28 U.S.C. §§1331, 1343, 1391 and 2201.

[3] Judge Goettel acknowledged his "personal doubt" that the precedent relied upon to determine the alleged violation was "consistent with the intention of the Framers at the time the First Amendment was adopted. *Warner I*, 870 F. Supp. 69, n.2 (S.D.N.Y. 1994). He noted the distinction drawn by the Framers between "established religions such as had existed in England" and "public observance of religion in a non-denominational sense." *Id.* (94a)

The procedural history following Orange County's appeal from Judge Goettel's decision in *Warner I* is somewhat confusing. By decision dated September 9, 1996, the Second Circuit affirmed *Warner I*. (54a-86a) In its September 9, 1996 decision, the Second Circuit analyzed three (3) issues: First, whether Orange County should be liable if, under New York law, the determination of probation conditions is solely the responsibility of the sentencing judge. Secondly, the court addressed the issue of whether Orange County is, or should be immune from damages because it was acting in a quasi-judicial capacity. Finally, the Second Circuit analyzed whether requiring Warner to attend A.A. violated the Establishment Clause.

The Second Circuit concluded without any analysis under *Lemon* and progeny that A.A. was a "religion" and that requiring Warner to attend A.A. meetings as a condition of probation violated the Establishment Clause. (71a) It further held that Orange County was liable through its probation department for having made the initial recommendation to the sentencing judge, i.e., that the judicial act of adopting the recommendation was not a superseding cause relieving Orange County from liability. (62a) The Second Circuit concluded that Orange County was not entitled to immunity, despite the fact that the recommendation had been made by the probation department in its quasi-judicial capacity. (66a)

Orange County timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Prior to acting on the Petition for Rehearing, the Second Circuit withdrew the September 9th decision from the Federal Reporter. *See*, *Warner v. Orange County Dept. of Probation*, 95 F.3d 202 (2d Cir. 1996). (54a (Editor's Note)) On May 14, 1997, the Second Circuit issued an amended decision, *Warner v. Orange County Department of Probation*, 115 F.3d 1068 (2d Cir.1997) ("*Warner II*"). (23a-53a) The *Warner II* decision contains an order which vacated both the original September 9th and amended May 14th decisions.[4] (51a-53a) The order also denied the Petition for Rehearing

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[4] Confused by the language of the order which appeared to have the effect of vacating both the amended May 14, 1997 decision, as well as the previously issued September 9, 1996 opinion, Orange County (joined by

and remanded the matter back to the District Court for consideration of the narrow issues of whether Warner had consented to the condition of probation, or waived his right to challenge its imposition and whether Orange County had previously raised these issues.

Significantly, the Court in the amended *Warner II* decision deleted the entire portion of the (now vacated) September 9, 1996 decision which analyzed the issue of the application of judicial immunity to probation departments. The court claimed in *Warner II* that this issue had not been properly put before it. (27a, n.1; *but see*, 9a, n.4) Yet, Orange County had consistently argued that it should not be found to be liable because it had only recommended and not imposed the condition of probation at issue. Orange County also contended that it should not be found to be liable because it was at all times acting under the authority and direction of the sentencing court.

On remand, Judge Goettel determined that Orange County had not previously raised the issue of consent or waiver. *See Warner v. Orange County Department of Probation*, 968 F. Supp. 917 (S.D.N.Y. 1997) ("*Warner III*") (6a-9a at 8a) Pursuant to the Order of Remand, Judge Goettel also determined after considering the evidence that Warner had neither consented to nor waived his right to challenge the Orange County recommendation of attendance at A.A. meetings as a condition of probation because he was not "sufficiently aware" of the religious aspects of the program at the time of sentencing, or within the time in which he might have appealed. (17a-19a) Judge Goettel's finding that Warner was not "sufficiently aware" of the spiritual component of the A.A. program is difficult to reconcile with the facts relating to his initial voluntary presentence attendance at A.A. meetings, some of which were held in churches and each of which he claimed began and ended with a prayer. (10a-11a)

Orange County appealed from *Warner III*. By decision dated April 19, 1999 ("*Warner IV*") (1a-5a), the Second Circuit affirmed Judge Goettel's decision in *Warner III* relating to the consent and waiver

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Warner) moved for clarification. The Second Circuit confirmed by Order dated May 28, 1997 that each of the opinions had, indeed, been vacated. (20a-22a)

issues tried on remand and reinstated its previously amended and vacated May 14, 1997 decision ("*Warner II*").

Putting aside for the moment the Second Circuit's treatment of the consent and waiver issues, the primary significance of the decision in *Warner IV* was to reinstate *Warner II*. In *Warner II*, the Second Circuit found that the A.A. program to which Warner was exposed contained a "substantial religious component" that violated the Establishment Clause and that Orange County, through its probation department, was liable despite the judicial act of imposing the offensive condition as part of Warner's sentence. (24a)

The court in *Warner II* (in addition to deleting all analysis and discussion with respect to the application of judicial immunity to a probation department exercising quasi-judicial functions) rejected Orange County's argument that the determination of probation, a judicial task which may not be delegated to probation officers, was a superseding cause. (28a-32a) Rather, the *Warner II* court applied the common law tort principle of "foreseeability" to find that Orange County's recommendation that Warner continue as a condition of probation his previously voluntary attendance at A.A. meetings was the "proximate cause" of Warner's injury.

The court analyzed foreseeability in terms of : 1) Whether it was reasonably foreseeable that the sentencing judge would adopt Orange County's recommendation that Warner attend A.A; and 2) whether it was reasonably foreseeable to Orange County that the A.A. meetings Warner attended were "religious." Despite uncontradicted testimony to the contrary (JA-133a-138a, 45a), the court concluded that it was "foreseeable" that the sentencing judge would adopt the probation department's recommendation and that Orange County was aware of the spiritual nature of the A.A. program.

From Orange County's perspective, the judicial act of imposing the offensive condition was a superseding act. However, even if the facts are analyzed based upon foreseeability, the issue should have been framed as whether it was foreseeable that a ten-year avowed atheist who had attended four (4) or five (5) A.A. meetings, some of which were held in churches and each of which began and ended with a

prayer, would have voiced some objection, either at the time of sentencing, or within the time-frame allowed to appeal from a sentence.

When viewed from this perspective, it was not "foreseeable" that the sentencing judge would have ordered the offensive condition. Indeed, Warner acknowledges in his complaint that the sentencing judge altered the offensive condition upon being alerted some two years into his probationary period that Warner objected on religious grounds. (JA-15a) Based upon the evidence, it seems clear that the sentencing judge would not have imposed the offensive condition if Warner had expressed any concerns about the spiritual component of the self-help rehabilitation program he had already voluntarily attended.

If "foreseeability" is to apply at all under the facts and circumstances,[5] the proximate cause of Warner's "injury" was not the recommendation made by the probation department. Rather, the proximate cause was either the superseding act of the sentencing judge who imposed the offensive condition, Warner's voluntary presentence attendance in order to avoid jail time, or his failure to voice an objection to or appeal from the offensive condition.

Conspicuously absent from the Second Circuit's opinion in *Warner II* is any analysis under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*") and the three-part test set forth therein ("Lemon Test"). Indeed, both the District Court and Second Circuit Court expressly rejected the application of the Lemon Test. (4a, n.8) Based upon the reasoning of *Lee*, the Second Circuit in *Warner* found that the Establishment Clause had been violated because Warner had been "coerced" into participating in "religious exercises." (36a) Glossing over Warner's own voluntary attendance at A.A. meetings prior to being sentenced upon the advice of his counsel, the Second Circuit found "coercion" simply by virtue of the inclusion of attendance at A.A. meetings in the probation department's recommendation of special conditions of probation without having been offered an alternative choice of therapy.

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[5] From Orange County's perspective, this analysis would have ended with the finding that there was no Establishment Clause violation, or that the judicial action was a superceding cause.

(Now Chief) Judge Winter vigorously dissented from the majority opinions in *Warner II* and *Warner IV*. He concluded both before and after remand that Warner had not been coerced, but had voluntarily chosen to attend A.A. meetings after consultation with his attorney in order to mitigate the severity of his sentence. (5a, 42a-43a) Having done so, Warner forfeited or waived his claim, or under common law tort principles had consented to the alleged intentional tort of recommending attendance at A.A. as a condition of probation. (5a, 43a-47a)

Moreover, Chief Judge Winter determined that the judicial imposition of the sentence constituted an independent cause that superseded the recommendation of the probation department. (44a-46a) Chief Judge Winter also questioned whether the action should ever have been brought and decided under the Establishment Clause. In his view, the constitutionality of the action should have been determined, if at all, under the Free Exercise Clause, which Warner did not assert. (47a)

Reasons for Granting the Writ

I Alcoholics Anonymous Should Not Be Defined As A "Religion" For Establishment Clause Purposes.

As a threshold matter, it must be determined whether A.A. is a "religion," or sufficiently "religious" to trigger the Establishment Clause of the First Amendment. Based upon the split of opinions around the country in recent cases dealing with governmental referral of convicted substance abusers to A.A. programs, or those modeled upon the Twelve Steps (reproduced at JA-27a), it appears that the determination with respect to whether A.A. is, or is not a "religion" will depend upon whether the particular court analyzes the issue using the Lemon Test (or some formulation of it), or the *Lee* "coercion" test. If *Lemon* is used, A.A. is not sufficiently "religious" to implicate the Establishment Clause; if *Lee* is used, A.A. is sufficiently "religious" and violates the Establishment Clause (because the government is involved and coercion necessarily always found). Such important constitutional and social issues should not be left to the vagaries of chance.

A.A. is an independent organization which expressly disavows affiliation with any sect, denomination, organization or institution. (JA-153a) It is self-supporting, but does not require membership dues of any kind. (JA-153a) To maintain its neutrality and independence, A.A. accepts donations only from (anonymous) A.A. members and has placed a $1,000 ceiling on the amount it will accept from any one individual. *See*, Alcoholics Anonymous World Services, Inc., The A.A. Serv. Manual 129 (1987). In 1994, A.A. was comprised of over 90,000 independent groups worldwide with a membership totaling over 2 million recovering alcoholics and drug addicts. *See* Alcoholics Anonymous World Services, Inc., Alcoholics Anonymous Comes of Age: A Brief History of A.A. 31 (1994).

A.A. is widely accepted as an effective means with which to combat the disease of alcoholism. *See e.g.*, *Warner I*, (88a-89a, 107a) (A.A. has been helping men and women recover from alcoholism since the 1930's and there is no reason to doubt the effectiveness of the program); *Wilcox v. Wilcox*, 24 N.W.2d 237, 241 (1946) (A.A. has been of great aid to those who have become "victim of the habit."). *See also*, BUFE, C., ALCOHOLICS ANONYMOUS: CULT OR CURE? (1991) at p. 9 (A.A. commonly believed to be most effective treatment for alcoholism); GOLDSTEIN, A., ADDICTION: FROM BIOLOGY TO DRUG POLICY (1994) at p. 131 (shared impression among professionals is that Twelve Step programs are best for most alcohol addicts); SEGAL, B., DRUGS AND BEHAVIOR: CAUSE, EFFECT AND TREATMENT (1988) at p. 288 (noting widespread acceptance of A.A. by drug treatment professionals).

The A.A. "Big Book," which sets forth the tenets of A.A., invokes Twelve Steps it claims are necessary to achieve recovery from alcoholism. (JA-27a) Several of the Twelve Steps invoke "God" by name or reference. However, this should be viewed in light of the flexible nature of A.A. and its accommodation of various spiritual and non-spiritual philosophies, along with the context in which A.A. is used, i.e., for self-help rehabilitation, rather than incarceration of convicted substance abusers. The oft-cited terms and phrases alleged to be offensive, such as "God as we under[stand] him" and "higher power," although arguably monotheistic, do not demonstrate any preference for a specific religion, or no religion. Moreover, A.A. as

an organization, advances a "spiritual" not a "religious" definition of itself. (JA-25-a) Agnostics and atheists are expressly welcome to attend the program. (JA-22a-23a) As set forth in an A.A. pamphlet offered into evidence during the *Warner* trial:

> "The majority of A.A. members believe that we have found the solution to our drinking problem not through individual will-power, but through a power greater than ourselves. However, everyone defines this power as he or she wishes. Many people call it God, others think it is the A.A. group, still others don't believe in it at all. There is room in A.A. for people of all shades of belief and nonbelief."
> (JA-26a)

The A.A. program should not be found to fall within the definition of "religion," or constitute an "establishment of religion" solely because it is used as a self-help rehabilitation tool in the context of administering criminal justice. No reasonable person would view referral to A.A. as a governmental endorsement of religion. The more reasonable view is that the government is endorsing self-help and/or rehabilitation, rather than incarceration of convicted substance abusers.

Lower courts which have grappled with the issue of whether A.A. is a "religion" which triggers the Establishment Clause have come to different conclusions depending upon whether their emphasis is on *Lemon* or *Lee*. For example, in *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Kan. 1991), the court distinguished between the terms "spiritual" and "religious" and concluded that the former does not constitute the latter for Establishment Clause purposes. With respect to A.A.'s acknowledgment of a "Supreme Being," the *Stafford* court expressly concluded that "[W]hile the expression of the philosophy of Alcoholics Anonymous includes a reference to a Higher Power, this court cannot on that basis alone reasonably conclude that Alcoholics Anonymous constitutes a religion or that a religion was impermissibly thrust upon plaintiff." *Id.* at 1017 (relying upon *United States v. Seeger*, 380 U.S. 163 (1965) (Douglas, J., concurring). Finding that A.A. was not a "religion," the *Stafford* court concluded that including

attendance at A.A. meetings as a condition of probation did not violate either the Establishment or Free Exercise clauses.

Likewise, in *Jones v. Smid*, 1993 WL 719562 (S.D. Iowa, April 29, 1993) (No. 4-89-CV-20857), the court concluded that A.A. did not constitute a religion for First Amendment purposes because it was so flexible in accommodating various individual beliefs. It found the religious components ambiguous, at best. Notwithstanding that the court found that A.A. was not a "religion," it analyzed the facts under both *Lemon* and *Lee*. It determined that *Lemon* was the appropriate case to be applied and that the A.A. program at issue passed all three prongs of the Lemon Test. *Id.* at p. 10.

In *O'Connor v. California*, 855 F. Supp. 303 (C.D. Cal 1994), the court was faced with the issue of whether A.A. could be offered as a choice among other possible treatment programs. It found no Establishment Clause violation because probationers were offered a choice between A.A. and other programs.

Nonetheless, the *O'Connor* court analyzed the facts under the Lemon Test, adding the "endorsement" element set forth in *Allegheny v. ACLU*, 492 U.S. 573 (1989).[6] It concluded that a probation condition of attendance at A.A. had the primary effect of treating substance abuse (not to advance religious beliefs); that the state was not endorsing the tenets of A.A.'s philosophy, but the general concept of self-help; and that the probation department's connection with A.A. was at arms-length and did not amount to an excessive entanglement. *Id.* at 308.

The *O'Connor* court also concluded that A.A.'s main objective was not religious, but "[t]o stay sober and help other alcoholics achieve sobriety." *Id.* at 306. The *O'Connor* court, too, distinguished between mere "spirituality" and "religion" and pointed out that each individual meeting is conducted by a leader chosen by the particular group's

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[6] In *Allegheny*, the majority accepted Justice O'Connor's proposal in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) that "the proper inquiry under the purpose prong of *Lemon* [is] whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* *See also*, discussion, *infra*.

members, who is assisted by other members and, thus, allowed for maximum flexibility in accommodating individual members' beliefs. *Id.*

Reaching a contrary conclusion, several other courts, applying *Lee* to the exclusion of *Lemon*, have held that A.A., or a program modeled on the Twelve Steps is sufficiently "religious" to violate the Establishment Clause. These cases include *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), in which the Seventh Circuit reversed a lower court decision by holding that requiring an inmate at a state correctional institution to attend Narcotics Anonymous violated the Establishment Clause. The basis for finding the constitutional violation was that A.A. was "religious" and governmental action was present. (The lower court, which had applied the Lemon Test, found no constitutional violation. It had concluded that the program at issue had a secular purpose, neither advanced nor inhibited religion and that there was no state entanglement. *Id.* at 473.)

Likewise, in *Griffin v. Coughlin*, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), *cert. denied*, 519 U.S. 1054, 117 S. Ct. 681, 136 L.Ed.2d 607 (1997), the New York Court of Appeals reversed (over forceful dissent) a lower court decision and held that an atheist inmate could not be deprived of eligibility for expanded family visitation privileges for refusing to participate in Narcotics Anonymous, which is modeled upon the Twelve Steps of A.A. The lower court, applying *Lemon*, had held that the prison program did not offend the Constitution and cited with approval those cases which did not classify A.A. as sufficiently religious to offend the constitution. *See, Griffin v. Coughlin*, 211 A.D.2d 187, 626 N.Y.S.2d 1011 (3d Dept. 1995), *reversed*, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), *cert. denied*, 519 U.S. 1054, 117 S. Ct. 681, 136 L.Ed.2d 607 (1997).

The New York Court of Appeals in *Griffin*, reversing the lower court, relied almost exclusively on the coercion element of *Lee*: "Once, thus demonstrated that A.A. tenets and practices necessarily entail religious exercise, the conclusion appears unavoidable that its use by the State correctional system . . . violates the Establishment Clause." *Griffin v. Coughlin*, 88 N.Y.2d 674, 686, 649 N.Y.S.2d 903, 910, 673

N.E.2d 98, 105 (1996), *cert. denied*, 519 U.S. 1054, 117 S. Ct. 681, 136 L.Ed.2d 607 (1997). Likewise, both the District Court and the Second Circuit in *Warner* applied *Lee*, rather than *Lemon*, to find that A.A. was sufficiently "religious" such that by merely recommending attendance at A.A. as a condition of probation Orange County violated the Establishment Clause.

Clearly, there is much confusion about what constitutes "religion" and what is the proper standard to analyze situations in which government interacts, however minimally, with privately run programs which may have some spiritual or religious component. There is also great confusion about which precedent, *Lemon* or *Lee*, or neither, should govern in these circumstances.

The Court should use this opportunity to define "religion" in a way which allows government to encourage attendance at privately run self-help addiction programs such as A.A. The Establishment Clause should be read to accommodate, or acknowledge general concepts of "spirituality" which have been inextricably woven into our history and traditions. To do otherwise would constitute a hostility toward religion and spirituality not warranted by the Constitution and certainly not contemplated by the Framers. *See Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952) (there is no constitutional requirement which makes it necessary for government to be hostile to religion).

The reasoning of the *Warner* opinions casts doubt on the constitutionality of numerous historically acceptable acts which arguably favor religion over non-religion, such as "prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths – these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies . . .". *Id.* at 312-13.

In the alternative, the Court should determine that analyzing these kinds of cases under the Establishment Clause is improper and find that they should, instead, be analyzed and determined under the Free Exercise Clause of the First Amendment. That is because the Free Exercise Clause concerns the relationship between government and the individual, rather than the more general relationship between the

'government and "religion" in society. The Establishment Clause has not, heretofore, been conducive to balancing competing interests, particularly in the context of attempting to rehabilitate rather than incarcerate convicted substance abusers while administering criminal justice. *See, Griffin V. Coughlin*, 88 N.Y.2d at 694, n.7.

If an action of the state reaches the point where coercion of individuals is arguably present, or an individual's free exercise is burdened, it may be more appropriate to analyze the matter exclusively under the Free Exercise Clause. To do so would remain true to Supreme Court precedent which has kept separate the respective inquiries into the two religious clauses contained in the First Amendment. *See Everson v. Board of Education*, 330 U.S. 1 (1947).

The confusion which has resulted from analyzing these types of circumstances under the Establishment Clause rather than the Free Exercise Clause is underscored by the Second Circuit's decision in *Warner II*. There, the court intimated that the Establishment Clause violation could be "cured" by offering probationers a choice between A.A. and some other purely sectarian program. (37a) But, if recommending A.A. as a condition of probation is offensive under the Establishment Clause, offering a choice will not negate or neutralize the constitutional violation. As Chief Judge Winter stated in dissent, if A.A. is a "religion" and if recommending attendance at A.A. violates the Establishment Clause, then the State may not recommend A.A.; it does not matter whether A.A. is offered as one of several choices. (48a-50a)

II If The Establishment Clause Is The Appropriate Vehicle For Deciding Whether The Imposition Of Attendance At Alcoholics Anonymous As A Condition Of Probation For Recidivist DWI Offenders Violates The Constitution, *Lemon* And Its Progeny, Rather Than *Lee*, Should Be Applied.

Putting aside the issue of whether A.A. constitutes "religion," or merely a socially acceptable form of "spirituality" and assuming for the sake of argument that A.A. does constitute "religion," the imposition of attendance at A.A. as a condition of probation for recidivist

substance abusers should not be found to violate the Establishment Clause. There is no question, but that, if the Establishment Clause applies to these types of situations, *Lemon* and its progeny, not *Lee*, is the appropriate way to approach the context in which a county probation department recommends A.A. in order to address rehabilitation of convicted substance abusers.

A. *Lee* should be limited to its facts, as the court intended.

Lee is woefully inadequate at best, and inapplicable at worst, to the analysis of whether imposing attendance at A.A. meetings as a condition of probation for convicted substance abusers violates the Establishment Clause. First, the Court in *Lee* expressly limited its holding to the specific facts in the case, which involved prayers at primary and secondary school graduation ceremonies. *Lee*, 505 U.S. at 580. The school prayers at issue were required to comply with "advice" set forth in a school pamphlet about what would be considered acceptable. *Id.* at 581. The Court found that prayer on school grounds at a graduation ceremony, even though nonsectarian, was unconstitutional because of the psychological pressure (coercion) a student might feel to participate, or through her passivity be perceived by her peers to be participating. *Id.* at 593.

In finding an Establishment Clause violation, the *Lee* court underscored its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592. The *Lee* Court expressly distinguished *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding on constitutional grounds the opening of a legislative session with an invocation and benediction) on the grounds that *Marsh* involved mature adults. *Lee*, 505 U.S. at 596-97. Indeed, the court stressed that it was not addressing whether or not the holding would apply to a mature adult, let alone a recidivist DWI offender, or prison convict. *Id.* at 593.

Significantly, Justice Souter, in his concurrence in *Lee* noted: "If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had

individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. *Id.* at 608 n.8 (Souter, J., concurring) (citations omitted).

This hypothetical situation is much more analogous to the facts in *Warner*, even if *Warner* involves convicted substance abusers, rather than immature public school students. Orange County's referrals of mature adults to A.A. are made according to wholly secular criteria. The fact that a speaker at a particular A.A. meeting who is not a state actor chooses to deliver a message which has some spiritual element should not be viewed as an "endorsement" by the state.

The Court in *Lee* made it clear that: "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* at 597. The court in *Lee* also expressly acknowledged that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id. citing School Dist. of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Yet, the language in Lee respecting "coercion" has been taken by some courts as absolute to the exclusion of any analysis under *Lemon*.

The *Warner* decisions place much emphasis on the element of "coercion." The argument is that Warner was "coerced" because his only alternative to accepting the condition of probation was incarceration. (36a-37a) Yet, as pointed out by Chief Judge Winter, the question of whether a probationer who is sentenced to attending A.A. is being compelled to attend A.A., or is choosing to attend is not so easily resolved. (47a-48a)

First, a probationer is free to reject A.A., or any other rehabilitation program on religious grounds in favor of serving his sentence. *See Griffin v. Coughlin*, 88 N.Y.2d 674, 710, 649 N.Y.S.2d 903, 905, 673 N.E.2d 98, 120 (1996) (Bellacosa, J., dissenting), *cert. denied*, 519 U.S. 1054, 117 S. Ct. 681, 136 L.Ed.2d 607 (1997). Moreover, a probationer who objects to attendance at A.A. on religious grounds may raise a claim under the Free Exercise Clause. If a timely objection

is made, the state would be required to accommodate the offended person with some other alternative (as Warner, himself, was).

To focus exclusively on coercion in the context of the Establishment Clause creates confusion because coercion has historically been the hallmark of Free Exercise cases. The test for burdens placed upon free exercise by the state have been clearly stated by the Court. *See Employment Division Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (stating test for generally applicable neutral laws that burden religious practice); *Church of The Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (articulating test for laws not neutral under *Smith*). In *Turner v. Safley*, 482 U.S. 78 (1987), the Court set forth a test to apply to a regulation which impinges upon an inmate's constitutional rights. Under this test, such a regulation will be upheld if it is "reasonably related" to legitimate penological interests.[7] *See also, O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (setting forth test for prison regulations which burden free exercise of religion).

Moreover, a convicted substance abuser's social status becomes relevant in claims analyzed under the Free Exercise Clause, unlike claims analyzed under the Establishment Clause. *See e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (reasonableness test, not strict scrutiny applies to prison regulations which may infringe upon a prisoner's free exercise of religion); *Thornburgh v. Abbot*, 490 U.S. 401 (1989) (reasonableness test, not strict scrutiny applies to prison regulations which may infringe upon freedom of speech); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (reasonable suspicion, not probable cause standard, applies to probationers for search and seizure purposes under the Fourth Amendment).

In short, *Lee*'s sole focus on "coercion" is not an appropriate model to apply to a situation involving governmental action within the context

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[7] Probationers have not expressly been placed under one of these standards. However, several courts have found that the Turner Test applies to conditions of probation. *See e.g., United States v. Schiff*, 876 F.2d 272 (2d Cir. 1989); *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). *See also, Griffin v. Wisconsin*, 483 U.S. 868 (1987) (subjecting probationers to lower standard under the Fourth Amendment).

of the criminal justice system and interaction between privately run rehabilitation programs which may have some spiritual component. *Lee* should be found to be narrowly limited to the facts and circumstances involved in the case; school prayer in primary and secondary public schools.

B. The appropriate constitutional standard to be applied to determine whether recommending attendance at Alcoholics Anonymous in the context of administering criminal justice violates the Establishment Clause is *Lemon v. Kurtzman*, as interpreted and/or modified by later-decided cases.

Although there has been much criticism leveled against *Lemon*, it remains valid law which, under the principle of *stare decisis*, should be followed. The perceived problem with *Lemon* may not be the analysis, itself, but the confusion among various courts in deciding when and in what manner to apply it. *See e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (Scalia, J. with whom Thomas, J., joins, concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . . ".) The facts and circumstances in Warner, make it an ideal vehicle for this Court to use in order to clarify the application of the Lemon Test.

In *Lemon*, the court constructed the three-part Lemon Test to determine whether governmental action violated the Establishment Clause. This test required that the governmental act: 1) Must have a secular purpose; 2) a primary effect which neither advances nor inhibits religion; and 3) must not foster "excessive entanglement" with religion. *Lemon*, *supra*, 403 U.S. at 606 (citations omitted).

In *Lynch v. Donelly*, 465 U.S. 668 (1984), the Court emphasized its unwillingness in Establishment Clause cases to be confined to any single test because of the sensitive nature of inquiry. *Id.* at 672. In so doing, *Lemon* was not, by any means, overruled. To the contrary, the Court confirmed the usefulness of applying the Lemon Test. *Id.*

Justice O'Connor, in her concurrence in *Lynch*, suggested that "[t]he proper inquiry under the [second] purpose prong of *Lemon* [is] whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), a majority of this Court adopted as a guide in Establishment Clause cases the "no endorsement" aspect of the second prong of the Lemon Test.

Thus modified, the Lemon Test provides an appropriate analysis under which to determine whether a probation department in the context of administering criminal justice may recommend attendance at Alcoholics Anonymous without violating the Establishment Clause. This is particularly so, when *Lemon* and its progeny are read together with the line of cases which allows for the accommodation by government of "religion,"or acknowledgment of "spirituality" where a social program's primary purpose is unquestionably secular. There is no question but that the primary purpose of recommending attendance at A.A. meetings as a condition of probation for convicted substance abusers is both rehabilitation (rather than incarceration) and public safety.

In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Supreme Court affirmed a grant to a hospital which was administered by the Catholic church finding that the "religious character" of the hospital was "wholly immaterial." *Id.* at 299. In so doing, the court focused upon the secular nature and the important social purpose of the work being performed, i.e., medical treatment for the poor.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Lemon Test was applied to uphold a federal statute which provided grants to colleges, some religiously affiliated, for the construction of campus facilities to be used for nonreligious purposes. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court rejected a challenge to state issuance of revenue bonds for private colleges, some of which were religiously affiliated. The Court in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) also approved a state annual grant program for religious colleges based on a percentage of the per-pupil amount the state spent on its public college students.

In *Bowen v. Kendrick*, 487 U.S.589 (1988), this Court applied the Lemon Test to validate direct governmental grants to churches and other religious organizations in order to provide family-planning counseling. The *Bowen* majority, expressed the firm view that the First Amendment does not prevent religious organizations from participating in publicly sponsored social programs. *Id.* at 609. Thus, *Bowen* stands for the proposition that government may "touch" religion and vice versa, in ways which do not necessarily offend the Establishment Clause.

The facts in *Bowen* are in many ways similar to those in *Warner*. The text of the statute at issue in *Bowen* explicitly mentioned the term "religion" four times. This is similar to the language alleged to be so offensive in the Twelve Steps. (JA-27a) However, the court found that mere reference to "religion" was not an impermissible advancement of religion, but only "reflect[s], at most, Congress' considered judgment that religious organizations can help solve the problems to which the [statute] is addressed" and had only the "incidental and remote" effect of advancing religion. *Id.* at 590, 607.

The *Bowen* court also rejected the notion that the statute authorized teaching on basic precepts of religious doctrine, simply because religious institutions received government funds. *Id.* at 590. Rather, it found that the serendipitous circumstance that Congress and certain religious groups enjoyed similar views was "insufficient to warrant a finding that the statute . . . has the primary effect of advancing religion." *Id.* at 613. With respect to alleged "excessive entanglement," the Court refused to accept "yet another Catch-22 argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Id.* at 615.

It is significant that the interaction between government and "religion" in *Warner* is much more attenuated than that in *Bowen*. The government in *Warner*, unlike *Bowen*, does not provide any funds, or participate in any way in the administration of Alcoholics Anonymous meetings. Surely, if the Establishment Clause allows direct financial aid to be given to the undeniably religious institutions in *Bowen*, it should not prohibit the government from recommending where

appropriate in the administration of criminal justice, mere attendance at A.A., an arguably non-religious group.

The referral of convicted substance abusers to A.A., rather than incarcerate them is clearly a secular purpose. The referral of recidivist substance abusers to A.A. programs, or other programs modeled on the Twelve Steps does not advance or inhibit religion or convey any endorsement whatsoever of the spiritual content of the program. Rather, such referrals may be seen as an endorsement of self-help rehabilitation programs generally, or of endorsing the concept of rehabilitation, as opposed to incarceration.

From Orange County's perspective, it does not matter whether the A.A. program has any, some, or no spiritual component. All that matters from Orange County's perspective is that convicted substance abusers undergo counseling to alleviate their problems without the necessity for incarceration and, by so doing, cease both to be a threat and a burden to society. Whether the A.A. program has any, some, or no spiritual component is incidental to the overall goal sought to be achieved; sobriety. Finally, recommending A.A. for convicted substance abusers does not foster "excessive entanglement" with religion. The government does not involve itself in any way in the substance of particular A.A. programs.

For these reasons, the Establishment Clause has not been offended.

III The Imposition By A Sentencing Judge Of A Special Condition Of Probation Recommended By A Probation Department Requiring Attendance At A.A. Meetings For A Convicted Substance Abuser Constitutes A Superseding Cause Which Should Relieve A Municipality of Liability For Damages Under 42 U.S.C. Section 1983.

As set forth previously, the imposition of a condition of probation which requires a convicted substance abuser to attend A.A. meetings should not be found to violate the Establishment Clause. Nonetheless, assuming *arguendo* that a sentencing judge imposes a condition of probation which is later found to be unconstitutional, a municipality

should not be liable under 42 U.S.C. Section 1983 for merely recommending the "offensive" condition, a quasi-judicial function which it is legally required to do. The judicial act of formally ordering the condition as part of probation constitutes an independent cause which supersedes the probation department's mere recommendation.

Principles of causation applied in tort law are relevant when analyzing Section 1983 cases. *See Buenrostro v. Collazo*, 973 F.2d 39, 45, (1st Cir 1992); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). A superseding cause will operate to relieve a Section 1983 defendant of liability. *See e.g., Jeffries v. Harleston*, 52 F.3d 9, 14 (2d Cir.), *cert denied*, 516U.S. 862, 116 S. Ct. 173, 133 L.Ed.2d 114 (1995); *Gutierrez-Rodriquez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989).

In finding that a municipality is liable under Section 1983 for merely recommending to the sentencing judge the probation condition, the *Warner* decisions focus exclusively on the tort law principles of "foreseeability" and "proximate cause." The Court completely failed to apply or balance other equally important and applicable rules governing intentional torts, including superseding causes, waiver and consent. As Chief Judge Winters emphasized in his Dissent in *Warner II*, the court completely failed "to give any recognition to the more appropriate rules governing intentional torts, to the power of a party to a court proceeding to avoid harm by raising objections and taking appeals, or to the role of the judge as an independent decision-maker." (51a)

In reaching the conclusion that the imposition of recommended conditions of probation by a sentencing judge is not an independent cause which supersedes the recommendation of a probation officer, the Court in *Warner* intimated that a sentencing judge would likely "rubber-stamp" recommended conditions of probation concerning substance abuse. (32a) The court simply ignored the uncontroverted testimony presented during trial that New York judges frequently reject special conditions of probation. (JA-133a-138a) Nor did the *Warner* Court address the fact that Orange County was without any authority to alter the conditions of probation; Orange County, too, was bound by the local court's sentencing order.

In essence, the court in *Warner II* found that Orange County was liable under Section 1983 because it was "foreseeable" that the recommendation it made with respect to attendance at A.A. would result in "harm." The court found that Orange County's liability flowed from the fact that it was "foreseeable" that the sentencing judge would adopt Orange County's recommendation of the special condition of probation requiring attendance at A.A. Because it was "foreseeable" that the judge would "rubber-stamp" Orange County's recommendation, the recommendation, itself, rather than its ratification by the sentencing judge, was determined to be the "proximate cause" of Warner's "damages."[8]

There is no question but that New York judges must make their own independent judgment in sentencing proceedings. *People ex rel. Perry v. Cassidy*, 13 A.D.2d 556, 257 N.Y.S.2d 228, 229 (3d Dept. 1965). Under settled New York law, a heavy presumption of correctness is applied to sentencing proceedings where no error is brought to the attention of the sentencing judge. *See, e.g., People ex rel. Brown v. La Vallee*, 211 N.Y.S.2d 728, 729 (1961), *Honeycutt v. Ward*, 612 F.2d 36, 41 (2d. Cir. 1979), *cert. denied*, 446 U.S. 985 (1980).

Despite these settled legal principles and the testimony of a probation officer during trial that New York judges frequently reject recommended conditions of probation, the Court concluded that it was "foreseeable" that the sentencing judge in *Warner* would simply "rubber-stamp" all of the sentencing recommendations made by a probation officer. (32a)

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[8] In the (now vacated) September 9, 1996 Warner decision, the Court also found that Orange County's recommendation rendered it liable because "Warner's failure to object was entirely foreseeable." The court explained that, even if Warner was aware of the religious content of A.A., he might not have known at the time sentence was imposed that the religious content gave him any legal basis to object. (63a) Even if he knew he could object on religious grounds, the court explained that he might have been "afraid to annoy the sentencing judge." (63a) This argument was eliminated from the modified decision in *Warner II*.

Even Warner's own complaint makes it clear that the particular sentencing judge would not have imposed the condition of attendance at A.A., if Warner had, at any time, voiced his concerns about the religious aspects of A.A.[9] When Warner finally got around to voicing his complaints in a forum which had the legal authority to address and alleviate his concerns, the same sentencing judge who had imposed the "offensive" special condition did not hesitate one moment to rule that Warner could comply with the probation condition by attending an alcohol counseling program of his choice. (115a-116a)

Malley v. Briggs, 475 U.S. 335 (1986), which the *Warner* Court relied upon to reject Orange County's argument that the judicial act of sentencing constituted a superseding cause actually supports Orange County's position. In *Malley*, the Court found that a police officer's reliance on the issuance of a warrant by a judicial officer was not justified, (i.e., was not a superseding cause relieving the officer of liability for executing the warrant), if "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345. *Malley*, thus, stands for the proposition that the judicial act of issuing the warrant would have been a superseding cause, if the affidavit contained facts which a reasonable officer would believe amounted to probable cause to issue the warrant, i.e., if it would have been objectively reasonable for the police officer to have submitted the affidavit.

The circumstances in *Malley* involved the *ex parte* procurement of a search warrant by a police officer, not an adversarial sentencing hearing at which the defendant has the constitutional right to counsel and due process, including immediate appellate review. More importantly, it was "objectively reasonable" for the probation department to issue to the court its recommendation that Warner continue as a condition of probation his previously voluntary attendance at A.A.

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[9] Warner's own complaint alleges that "[a]s a result of the Town of Woodbury Justice Court's Decision and Order, plaintiff is currently no longer required by his probation officer to participate in [A.A.] but is, instead, required to attend an alternative program."(JA-15a)

The Court in *Warner IV* expressly found that "the county officials had little reason to believe at the time that a sentence requiring A.A. participation might violate the First Amendment." (4a) Thus, the *Warner* Court recognized that it was "objectively reasonable" for the probation officer to have made the recommendation. Indeed, the *Warner IV* Court emphasized its "unhappiness with imposing damages on a governmental entity whose officials were seeking not to impose obligatory religion but to require an alcoholic to deal with his addiction." (4a)

It is inconceivable that the Court would find that it was "foreseeable" that Orange County's "recommendation would result in the harm" when, at the time the recommendation was made (as opposed to reviewing the facts with the benefit of hindsight) Warner, a ten-year avowed atheist, had already voluntarily attended four or five A.A. meetings (upon the advice of his attorney in order to reduce the severity of his sentence) and had not raised any objections before or at the time of sentencing with respect to any spiritual components of the program. If it was objectively reasonable for county officials to have recommended the later-determined "offensive" condition, how was the "harm" "foreseeable"?

Simply put, it was not foreseeable that Warner would not have voiced some concern after having voluntarily attended four or five A.A. meetings (some in churches and each of which began and ended with a prayer). If Warner had voiced some objection, the judge would not have imposed the condition. Therefore, the judicial act of formalizing the recommendation constitutes an independent cause which supersedes the initial recommendation.

The *Warner* Court notes almost in passing that "[h]ad Warner either suggested A.A. as a condition of probation, or somehow communicated his agreement to such a conditions, we might well agree with Judge Winter [that his failure to object constituted consent or waiver which was, in fact, the proximate cause of his "damages."] (34a) Yet, the record is clear that Warner:

> "voluntarily began attending A.A. meetings on the advice of his counsel. It is conceded that he resorted to A.A. in the hope of

> obtaining a sentence of probation rather than jail time. The [Orange County] recommended probation on the condition that Warner continue what he had purposefully began, attendance at A.A. meetings. The sentencing judge independently arrived at the same conclusion. Warner neither objected to the sentence nor took an appeal. Asking for particular relief, not objecting to its imposition, and failing to appeal from that imposition is the very definition of waiver."

(5a) (Chief Judge Winter, dissenting) (citation omitted).

The record is also clear that Warner, himself, executed on December 13, 1990 the Order and Conditions of Probation which included the "special condition" that he attend A.A. meetings. (JA-147a-149a) By so doing, he "acknowledged" that all of the conditions of probation had been "fully explained" and agreed to abide by them while on probation.

It is hard to fathom how the Court concluded based upon all of these facts that Warner did not "somehow communicate his agreement to such a condition." As Chief Judge Winter concluded,

> "Warner's initiative in voluntarily selecting and attending A.A. meetings and his failure to bring his present claim to the court's attention were the cause of whatever constitutional harm he suffered from the recommendation of the probation officer. (footnote omitted) As his successful petition for state collateral review . . . and the recent decision . . . Griffin v. Coughlin . . . demonstrate, relief was his for the asking."

(44a)

Under the analysis set forth in the various *Warner* decisions, every municipality, through its local probation department, may be found to be liable under 42 U.S.C. Section 1983 for any recommendation made to and adopted by the judiciary, if the recommendation is later found to be unconstitutional. This liability will follow, even though the municipality is acting reasonably pursuant to its obligations under the

law and even if a criminal defendant voices no objection at sentencing and does not appeal from the offensive condition.

These are the very circumstances upon which the *Warner* decisions are based.

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari should be granted so that the important issues raised herein may be more fully briefed and decided.

Dated: Goshen, New York
June 28, 1999

Respectfully submitted,

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Appendix A: 173 F.3d 120

Robert WARNER, Plaintiff-Appellee,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION,
Defendant-Appellant.

Docket No. 95-7055.

United States Court of Appeals,
Second Circuit.

Submitted Oct. 16, 1997.

Decided April 19, 1999.

Probationer brought § 1983 action against county probation department, alleging that probation condition requiring his attendance at Alcoholics Anonymous (A.A.) meetings violated First Amendment establishment clause. The United States District Court for the Southern District of New York, 870 F.Supp. 69, found probation department liable for nominal damages of one dollar, and department appealed. The Court of Appeals, 115 F.3d 1068, remanded for determination as to whether probationer's failure to object to religious content of A.A. at sentencing resulted in waiver of First Amendment claim. On remand, the District Court, Goettel, J., 968 F.Supp. 917, made factual findings and determined that probationer did not waive or forfeit his constitutional claim. Department appealed. The Court of Appeals, Leval, Circuit Judge, held that: (1) district court's factual findings were supported by evidence, and (2) damages award of one dollar was appropriate.

Affirmed.

Winter, Chief Judge, filed dissenting opinion.

Robert N. Isseks, Middletown, N.Y. (Alex Smith, Middletown, N.Y., Of Counsel), for Plaintiff-Appellee.

Richard B. Golden, Orange County Attorney, Goshen, N.Y. (Kathleen A. Mishkin, Of Counsel), for Defendant-Appellant.

Before: WINTER, LEVAL, and CALABRESI, Circuit Judges.

Chief Judge WINTER dissents by separate opinion.

LEVAL, Circuit Judge.

This appeal comes to us following a post-remand hearing in the district court. We affirm the district court's supplemental findings and reaffirm the judgment.

Robert Warner brought this suit against the Orange County Department of Probation ("the County") under 42 U.S.C. § 1983, alleging that terms of probation imposed on him as part of a criminal sentence--requiring him to attend meetings of a local chapter of Alcoholics Anonymous ("A.A.")--forced him, an atheist, to participate in religious exercises in violation of his rights under the First Amendment's Establishment Clause. After a bench trial, the district court found a violation of plaintiff's rights. The court, however, found no substantial damages and made a nominal award of one dollar in Warner's favor. Warner v. Orange County Dept. of Probation, 870 F.Supp. 69 (S.D.N.Y.1994).

This panel affirmed the judgment. Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2d Cir.1997). (Now Chief) Judge Winter dissented. In his dissenting opinion Judge Winter raised an issue that had not been briefed or mentioned by either party on appeal. Judge Winter argued that Warner should be held to have consented to participation in A.A. despite its religious content (and to have forfeited his claim under § 1983)

because, having attended a few A.A. meetings voluntarily prior to being sentenced, he neither objected to the compulsory A.A. attendance imposed on him at sentencing, nor appealed. See id. at 1077-78. The majority disagreed: the evidence did not show that Warner's attendance at a few A.A. sessions prior to sentence gave him sufficient awareness of the nature or extent of the religious exercises to justify either imputing consent or charging him with forfeiture. See id. at 1074.

A poll was requested by a judge of this court to determine whether the case should be reheard in banc. In the course of that poll, interest was expressed in the question Judge Winter raised as to whether Warner should be held to have consented, and thus to have forfeited his civil claim.

Because there were no district court findings on this question, indeed no indication in the record on appeal that the issue had ever been raised in the district court, the panel decided (Judge Winter dissenting) to remand to the district court to determine 1) whether the County had ever asserted consent, waiver, or forfeiture, and 2) regardless of the answer to that question, whether, at the time he was sentenced, Warner was sufficiently aware of the nature and extent of A.A.'s religious component that his failure to object to, or appeal from, his sentence should be deemed a consent, waiver, or forfeiture. See 115 F.3d at 1081. We vacated our prior opinion pending the results of the remand. See id. at 1082.

The district court conducted an evidentiary hearing and made express findings. Warner v. Orange County Dept. of Probation, 968 F.Supp. 917 (S.D.N.Y.1997). The court found that the County had never raised any claim of consent, waiver or forfeiture. See id. at 919-20. The court further found that, although Warner observed some religious activity at the sessions he attended before sentencing, his doubts were assuaged when he was told the meetings were not religious but "spiritual." The

district court found it was not until well after he began serving his sentence (after the opportunity to object or appeal had passed) that Warner was exposed to the deeply religious nature of the program. The court thus found that Warner's failure to object to or appeal his sentence did not constitute consent to the sentence or a waiver or forfeiture of his constitutional claim. See id. at 922, 923-24.

The County now appeals from those findings. We find no merit in the County's position. The district court's factual findings are amply supported by the record, and its conclusion that there was no consent, waiver or forfeiture follows inevitably from these findings.[1]

We therefore reaffirm our prior affirmance of the judgment of the district court and reinstate our opinion vacated by the Order of Remand of May 14, 1997. See Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1082 (2d Cir.1997).

In so doing, we reiterate our unhappiness with imposing damages on a governmental entity whose officials were seeking not to impose obligatory religion but to require an alcoholic to deal with his addiction. While it seems clear enough that Warner should not under the First Amendment have been required to participate in religious exercises, it seems far less clear he should be entitled to damages--especially because the county officials had little reason to believe at the time that a sentence requiring A.A. participation might violate the First Amendment. Nevertheless, as we noted in our earlier opinion, the County cannot

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[1] Chief Judge Winter continues to dissent on the grounds, described above, that he advanced in Part I of his original dissent. If the facts indeed were as Judge Winter characterizes them, we would agree that Warner could not maintain this action. However, we remanded to the district court for factual findings on these issues, and the district judge's findings dispel those concerns.

avail itself of qualified immunity in the present case, see id. at 1071 n. 1, 1077 n. 9, and, under the circumstances, the district court's decision to set damages at the symbolic level of one dollar was just about right, see id. at 1077.

WINTER, Chief Judge, dissenting:

I continue to dissent for the reasons stated in Part I of my earlier separate opinion.

To reiterate briefly, Warner, before sentencing and facing his third alcohol- related driving offense in one year, voluntarily began attending AA meetings on the advice of counsel. It is conceded that he resorted to AA in the hope of obtaining a sentence of probation rather than jail time. The Orange County Probation Department recommended probation on the condition that Warner continue what he had purposefully began, attendance at AA meetings. The sentencing judge independently arrived at the same conclusion. Warner neither objected to the sentence nor took an appeal. Asking for particular relief, not objecting to its imposition, and failing to appeal from that imposition is the very definition of waiver.

I therefore dissent.

Appendix B: 968 F.Supp. 917

Robert WARNER, Plaintiff,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION,
Defendant.

No. 93 Civ. 1544(GLG).

United States District Court,
S.D. New York.

June 27, 1997.

Probationer brought § 1983 action against county probation department, alleging that probation condition requiring his attendance at Alcoholics Anonymous (A.A.) meetings violated First Amendment establishment clause. The District Court, 870 F.Supp. 69, found probation department liable for nominal damages of one dollar. Probation department appealed. The Court of Appeals, Leval, Circuit Judge, remanded for determination as to whether probationer's failure to object to religious content of A.A. at sentencing resulted in waiver of First Amendment claim. On remand, the District Court, Goettel, J., held that: (1) county's failure to plead waiver as affirmative defense prohibited county from claiming that probationer's failure to object at sentencing constituted waiver of his First Amendment claim; (2) probationer's failure to object to or appeal from imposition of special condition of probation did not constitute waiver of his right to bring subsequent civil action; and (3) any consent deemed to have resulted from probationer's failure to object was limited to scope of probationer's awareness of A.A. program's contents at time he gave such consent.

Previous judgment affirmed.

Robert N. Isseks, Goshen, NY, for Plaintiff.

Richard B. Golden, County Attorney, Goshen, NY (Kevin Coffey, of counsel), for Defendant.

MEMORANDUM DECISION

GOETTEL, District Judge.

This matter is before this Court in an unusual posture. The events involved in this case occurred between 1990 and 1992. The action was commenced in 1993. It was tried in 1994 with a verdict for the plaintiff. Warner v. Orange County Department of Probation, 870 F.Supp. 69 (S.D.N.Y.1994). Defendant then appealed. On September 9, 1996 the Court of Appeals affirmed with a dissent. Warner v. Orange County Dept. of Probation, 95 F.3d 202 (2d Cir.1996). The defendant then moved for rehearing, suggesting that the rehearing be held en banc. On May 14, 1997, the Second Circuit Court of Appeals amended the original majority decision, Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2d Cir.1997), but on the same date also issued a remand order. Warner, 115 F.3d.1068 (2d Cir.1997). The Court of Appeals Clerk's Office advises that both the original opinion and its amendment have been vacated by the order of remand so that no opinions remain outstanding.[1]

The remand order notes that, in connection with the petition for rehearing, "judges of this Court have expressed an interest in whether Warner, by failing to appeal his sentence, waived or

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[1] We do not profess to understand why an amended opinion should be filed on the same date that it is to be vacated by an order of remand. Moreover, the Court of Appeals issued another order with respect to the petition for hearing stating that the petition "is rendered moot in light of the amended opinion and order or remand issued May 4, 1997." That order suggests that the amended opinion still has vitality.

forfeited the right to seek damages under § 1983, and in whether the County raised the issue at trial." The remand then directs the District Court to consider two questions: (1) whether the County asserted at trial that there had been a waiver or forfeiture of the claim and (2) whether the plaintiff was sufficiently aware at the time of the sentence of the extent of the religious practices of Alcoholics Anonymous ("A.A.") that his failure to object to, or appeal from, his sentence [which included a probationary condition of attendance at A.A. meetings] should be deemed "a consent, or a waiver or forfeiture" of his § 1983 claims.[2] The Court further notes that, even if the issue had not been raised at trial, the Court should conduct a hearing to insure that the parties have an adequate opportunity to present evidence on the question, following which the Court should make findings.

THE COUNTY'S ASSERTIONS AT TRIAL

Waiver is an affirmative defense. Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure it must be plead affirmatively by the defendant. It was not so plead in this action. The failure to so plead would have prohibited the making of such a claim at trial. Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 n. 2 (2d Cir.1988). Moreover, throughout the proceedings and at trial, the position of the defendant County was (and still is) that the A.A. program is not religious. Defendant conceded that the step meetings had a greater religious aspect than other types of

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[2] We are not entirely clear about the meaning intended by the use of the word "forfeiture." Waiver is defined as "the relinquishment or refusal to accept of a right" and "the intentional relinquishment of a known right." Bouvier's Law Dictionary Vol. 2 3417 (3d ed.1914). For the same definition see Black's Law Dictionary 1751-52 (4th ed.1957). Forfeiture on the other hand has numerous definitions, mostly related to the loss of property and its uses in admiralty law. Of course, if one waives his rights he may be said to have forfeited them. Thus, throughout these findings we will make no distinction between waiver and forfeiture.

meetings,[3] but claimed that the plaintiff never attended them and was never admonished for not attending them. See defendant's Rule 3(g) statement, ¶ 5, filed June 22, 1993. The plaintiff vigorously disputed this assertion, stating that he attended at least ten step meetings pursuant to the direction of his probation officer and further that, when he was offered an alternative treatment program at the Pious School in Orange County, that program also taught the Twelve Steps. While the defendant made a pre-trial motion to dismiss and filed a trial memorandum it did not raise, or even suggest, such an issue in its arguments.[4] Nor was such an issue raised on appeal, although it became one of the two central issues in the dissent. See Warner, 115 F.3d 1068 (2d Cir.1997) (Winters, J., dissenting). However, there

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[3] Materials distributed by A.A. describe the various types of meetings as being:

a. Open speaker meetings--open to alcoholics and nonalcoholics. (Attendance at an open A.A. meeting is the best way to learn what A.A. is, what it does, and what it does not do.) At speaker meetings, A.A. members "tell their stories." They describe their experiences with alcohol, how they came to A.A., and how their lives have changes as a result of A.A.

b. Open discussion meetings--one member speaks briefly about his or her drinking experience, and then leads a discussion on any subject or drinking-related problem anyone brings up.

(Closed meetings are for A.A.'s or anyone who may have a drinking problem.)

c. Closed discussion meetings--conducted just as open discussions are, but for alcoholics or prospective A.A.'s only.

d. Step meetings (usually closed) --discussion of one of the Twelve Steps. Plaintiff's Exhibit 3.

[4] Defendant now argues that it raised the issue, but this Court failed to address it in its decision on defendant's first motion to dismiss, Warner v. Orange County Dept. of Probation, 827 F.Supp. 261 (S.D.N.Y.1993), or in the decision of the case, Warner v. Orange County Dept. of Probation, 870 F.Supp. 69 (S.D.N.Y.1994). In those motions, discussion of plaintiff's actions was confined to defendant's unsuccessful claims of collateral estoppel and judicial immunity.

was evidence presented at trial from which an argument of waiver, if properly pled, could have been made, but was not.

There were only three witnesses at trial, the plaintiff, his probation officer, and the County's probation director (whose testimony was limited, and did not touch on any possible waiver issue). In addition, the parties filed a stipulation of facts which, for some reason, was not included in the record on appeal.[5] The plaintiff's testimony, as related to the waiver issue, was that he attended four or five A.A. meetings prior to sentencing on his lawyer's recommendation so that the Court would look more favorably at him at sentencing and perhaps give him probation. When he first met with his probation officer a month after his sentence, or soon thereafter, plaintiff told Terwilliger that he thought the meetings were religious and that he was an atheist. He nevertheless was directed to attend three meetings per week for the next couple of years. He did so. He described the various kinds of meetings that he attended, which later included the step meetings. He indicated that prayers were said at virtually all meetings. At the step meetings, he was expected to read aloud parts of the steps.[6] When asked to read portions from

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[5] Finding of Fact 16 is that "On January 23, 1991, plaintiff told Terwilliger that the Alcoholics Anonymous meetings were too religious based for him, that the Twelve Steps 'mentioned God, morals, tell God yourself.' Despite this conversation, Terwilliger continued to direct plaintiff to attend Alcoholics Anonymous meetings but that he could pick the meetings he would attend." Later Mr. Terwilliger specifically directed the plaintiff to attend step meetings.

[6] The Twelve Steps are set forth in haec verbae in our decision, Warner, 870 F.Supp. 69, 70-71, and will not be repeated herein. The first three steps explicitly deny the possibility of recovery from alcoholism without reliance on a higher power. As stated in the above referenced decision, the hard question is whether A.A. should be considered the exercise of religion. As the decision states, "[t]o one with only a passing knowledge of the A.A. program, the gut answer would probably be no. However the testimony and

the book on the Twelve Steps, he refused. His explanation was that "[b]y reading from the step book I felt that I would have been practicing religion in a much more deeper sense. I felt the same way about it as if someone put a Bible in front of me and asked me to read a line from it, and that's offensive to me." Trial transcript pp. 37-38. At the first voluntary meeting he attended, he spoke on another subject, but thereafter refused to speak; this resulted in his feeling ostracized. On about four occasions, he specifically told his probation officer that he objected to the religious training to which he was being exposed. He formed the opinion over time that A.A. was a program of indoctrination, and that the program participants lied to him by telling him that the program was not religious, while at the same time telling him that he must pray in order to succeed in his rehabilitation. "The idea is to get you praying at all costs. Don't worry, it's not religious, just pray. After you are praying on a daily basis for so long, I think it's a brainwashing technique." Trial transcript p. 53.

On cross-examination, the plaintiff stated that the meetings he attended voluntarily before sentencing were held in various churches. At these meetings the Twelve Steps were discussed by persons in attendance and were presented in writing on a billboard.

The plaintiff's probation officer, Neal Terwilliger, also testified at trial. He indicated knowledge of the different types of A.A. meetings, but stated that he had never attended a step meeting. As to his familiarity with the A.A. program, he denied

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evidence in this case support the finding that the A.A. meetings plaintiff attended were the functional equivalent of religious exercise." Warner, 870 F.Supp. at 72. It is quite clear therefore that, while the steps allow some personal variation as to who and what God is, there is a substantial religious aspect in most of the steps.

that it had any substantial religious content, other than recitation of the Lord's prayer at the end of each meeting. He stated that, in the meetings he had attended, there was no discussion of the Twelve Steps. He confirmed that, in December, 1990, he directed plaintiff to attend three A.A. meetings a week. He further directed plaintiff to attend step meetings in October, 1991 when he learned that plaintiff had not been attending them. He also suggested that it would be wise for him to get the Twelve Step book. It was his belief that the Twelve Steps were talked about only at step meetings. As to the step meetings, he had been informed by other probationers that nobody requires you to speak. Terwilliger acknowledged that it was possible that the Twelve Steps were discussed at other types of meetings, depending on who was running them. However, at the meetings he had personally attended, God was not discussed. Although he acknowledged that the plaintiff had told him that the A.A. meetings were too religious, he was unaware at that time that the plaintiff was an atheist.

Based on the foregoing testimony, I find that, while there was some evidence to support the argument made in the dissenting opinion that plaintiff, knowing of the religious aspects, failed to object at sentencing or on appeal about the religious content of the A.A. programs, the County never raised this assertion at trial. Indeed, by virtue of its failure to plead waiver affirmatively, the County would have been foreclosed from making such an argument. Moreover, the assertion would have been directly contrary to its basic position that the A.A. program has no religious content.

HEARING CONCERNING CONSENT OR WAIVER

The remand order directs this Court to conduct a hearing on the plaintiff's awareness of the extent of A.A.'s religious practices as bearing upon whether his failure to object to or appeal his sentence should be deemed waiver or consent. It further directs

the Court to conduct a hearing to insure that both parties have an adequate opportunity to present evidence, following which the Court should make findings. From the above, we conclude that we are to determine, taking into account the additional evidence presented at the hearing, whether, if the issue had been properly presented at trial, this Court would have found consent or waiver.

The only witness called at the June 24, 1997 hearing was the plaintiff himself. The defendant called him, following which his own attorney cross- examined him. The following is a summary of his pertinent testimony.

Warner was arrested in February, 1990 for his third alcohol related driving infraction in a little more than a year. On September 4, 1990, he plead guilty and was sentenced November 13, 1990. He did not appeal the sentence. Based on the four or five meetings attended prior to sentencing, Warner was aware of religious aspects to A.A. meetings. However, the participants at the meetings told him that the program was not religious, but merely "spiritual". He became substantially more aware of the religious aspects of the program over time as he was exposed to the Twelve Steps. The Twelve Steps per se, were set forth on a billboard at the early meetings. At first he was open to the possibility that these steps could be worked by an atheist.[7] He did not consider the steps extensively until he had attended step meetings. Years later he read the book entitled Twelve Steps and Twelve Traditions, (Plaintiff's Exhibit 8), which expounds at greater length on the steps.

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[7] Warner testified that he originally had been agnostic, but about ten years ago became an atheist. The distinction between the two, as we understand it, is that an agnostic has no religious belief in the existence of God, but has not developed a firm conviction that there is no God. An atheist is convinced that there is no God.

Warner first saw his probation officer within a month of being sentenced and, at that time or shortly thereafter, advised his probation officer that participation in A.A. was religious. His probation officer disagreed with him based upon the probation officer's own experience and information. Several times during the next two years, Warner voiced his objections to being required to participate in A.A. meetings. He then obtained the services of his present attorney, who is a noted Orange County civil rights lawyer. His attorney filed a motion with the Town Court challenging the constitutionality of the sentence. The County opposed the motion arguing that it was moot. The Town Justice found that the motion was in fact moot because suitable alternatives by then had been made by the probation department for plaintiff to participate in an alternative program. [8]

Prior to being sentenced, Warner had not attended a step meeting. He first did so about a year after commencing probation, at the insistence of his probation officer. In the beginning, plaintiff believed that the meetings were not necessarily religious, but that their hidden intent was. As mentioned earlier, he did not become fully aware of the religious intensity of the step meetings until he had attended several of them. Of course, he was aware of other religious aspects of the meetings, such as the recitation of prayers before and after every meeting. However, at the meetings, he was told that different people have different concepts as to what God is. He also was told that God could be anything, even a "spoon". The speakers at the A.A. meetings

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[8] The dissent in the no longer existing opinions states that: "as soon as the judge was alerted to Warner's distaste for the religious aspects of A.A., the judge immediately altered that condition of probation. That being the case, the record support for the finding that the judge merely rubberstamped the recommendation of the probation officer is not apparent to me." Warner, 115 F.3d at 1079 (2d Cir.1997). It appears that the change was not effected in exactly that fashion.

said that the Twelve Steps were not religious but were "spiritual". He tried to reconcile his own perceptions with what others were telling him, but he gradually decided that they were wrong and were attempting to trick him. His evaluation of the A.A. program, as found in the Twelve Steps and in the "Big Book", Alcoholics Anonymous, (authorship not disclosed), as well as the speakers at the meeting, is that it is the loss of religion and belief in God that causes alcoholism. He was urged to pray even though he professed not to have any belief in God and prayer. He viewed these importations as being a form of brainwashing. His own experience was that he was capable of total abstinence from alcohol without any religious assistance and did so for a year. When he reached these conclusions, he obtained a new attorney, filed his unsuccessful motion in Town Court, and then commenced the instant action.

Based on the foregoing hearing testimony plus the evidence offered at trial, this Court makes the following findings of fact with respect to the issue directed by the remand order.

(1) The A.A. program for combatting addictive alcoholism is deeply religious.[9]

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[9] The dissent notes that the Establishment Clause interpretation in our decision, if followed, would endanger a number of penal programs that are commonly practiced, such as having prison chaplains who offer religious counselling and services and community service at soup kitchens operated by churches. We agree with that observation. Indeed in our earlier decision on defendant's motion to dismiss we had noted: The Supreme Court's treatment of the Establishment Clause has undergone substantial changes during the last half of this century, questioning practices that were common during the first 150 years following the passage of the First Amendment. We suspect that we have not seen the last of these changes. The Supreme Court once noted that "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).
Warner, 827 F.Supp. at 264.
In addition, in our decision in this case we state: We admit some personal

(2) The plaintiff perceived some of the religious aspects from his voluntary attendance at meetings before being sentenced.

(3) At these meetings, A.A. members attempted to convince him that their approach was not religious only "spiritual". His probation officer subsequently agreed that the A.A. program was not religious.[10]

(4) Over a period of two years, Warner ultimately became convinced that the A.A. program was religious, and that he was being subjected to religious indoctrination. He then commenced the legal proceedings leading to the present hearing.

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doubt that the current appellate interpretation of the Establishment Clause is consistent with the intentions of the Framers at the time the First Amendment was passed. The Framers were particularly concerned that there be no established religion such as had existed in England and other European countries, and which had caused numerous wars and uprisings. They were not, however, opposed to the public observation of religion in a non-denominational sense. This attitude persisted through the nineteenth century, and indeed even today some official, non- denominational religious practices persist, such as the presence of chaplains in the military service and in the Congress, and the words "In God We Trust" on our currency. However, in this century, consideration for the rights and attitudes of atheists and agnostics (as well as for non- Christian religions) has led to a much stricter view of what constitutes a violation of the Establishment Clause. We are of course compelled to follow the Supreme Court's teachings in this regard.

Warner, 870 F.Supp. at 73 n. 2.

[10] We are at a loss to understand the position taken by the probation department and the probation officer in that regard. It is possible that they are making a distinction between specific religious beliefs and more general ones. The A.A. approach is non-denominational and would be acceptable to most adherents of main line religions, except perhaps certain of those from the Far East. However, in the general sense of adopting the belief that there is a supreme being interested in, and overseeing, human behavior, the A.A. approach is clearly religious.

The order of remand calls for this Court to make "findings" and makes no reference to conclusions of law. However, it does envision the possibility of our amending the earlier judgment. Waiver is a mixed question of fact and law. See, e.g., Moynahan v. Manson, 419 F.Supp. 1139, 1143 n. 12 (D.Conn.1976), aff'd, 559 F.2d 1204 (2d Cir.), cert. denied, 434 U.S. 939, 98 S.Ct. 430, 54 L.Ed.2d 299 (1977). Consequently, we make a further finding, which is in part a conclusion of law, to indicate why we are not amending our earlier judgment.

A waiver of a constitutional right must be voluntary, knowing and intelligent. United States v. Morgan, 51 F.3d 1105, 1110 (2d Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 171, 133 L.Ed.2d 112 (1995). The act of waiver must be shown to have occurred with awareness of its consequences. Id. Waiver is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The waiver or loss of any fundamental right can neither "be presumed nor may it be lightly inferred." United States v. Mapp, 476 F.2d 67, 77 (2d Cir.1973)(internal citations omitted). The Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023. See also Doe v. Marsh, 105 F.3d 106, 110-111 (2d Cir.1997). Whether a defendant knowingly and voluntarily waived his rights "may only be determined after a careful evaluation of the totality of all surrounding circumstances...." United States v. Lynch, 92 F.3d 62, 65 (2d Cir.1996), quoting United States v. Anderson, 929 F.2d 96, 99 (2d Cir.1991).

The plaintiff ultimately reached the conclusion that performance of his probationary obligations, as required by his sentence, violated his constitutional rights. He was not asked when he reached that conclusion. However, since factually he was uncertain about the correctness of his involvement in religion, there is no reason to assume he had a firm conviction

that A.A. was intensely religious at the time of his sentencing. Consequently, we do not find, based on the totality of the facts, that his failure to object or appeal was knowing and intelligent. Moreover, his initial inaction was decidedly influenced by the possibility that any objections or non-compliance could lead to a jail sentence or revocation of probation. As the Supreme Court held in Minnesota v. Murphy, 465 U.S. 420, 435, 104 S.Ct. 1136, 1146, 79 L.Ed.2d 409 (1984), where the state expressly or impliedly asserts that "invocation of the privilege would lead to revocation of probation, it would have created the classical penalty situation, the failure to assert the privilege would be excused, and the prisoner's answers would be deemed compelled and inadmissible in a criminal prosecution." See also United States v. Oliveras, 905 F.2d 623, 627 (2d Cir.1990). Had Warner, during his probationary period, refused to attend the A.A. meetings, he would have been in a "classic penalty situation". Indeed, had he attempted to assert such a claim prior to sentencing, he ran the risk that the defendant, instead of recommending a probationary period, would have recommended a jail term. In light of the foregoing, we find that the plaintiff did not waive, when sentenced, his right to make a subsequent objection to a violation of his constitutional rights.

The remand order directs that we consider whether plaintiff's inactions should be deemed "a consent, or a waiver or forfeiture ..."Warner, 115 F.3d at 1082. Consent, of course, can be part of a waiver. However, we believe the term is used in the context expressed in the dissent, which speaks of consent to an intentional tort. Consent is defined as "[a] concurrence of wills. Voluntary yielding the will to the proposition of another." Black's Law Dictionary 377 (4th ed.1957). The dictionary notes that there is a difference between submission and consent. Id. In not objecting to the probationary sentence, Warner was submitting to the lesser of two evils, not voluntarily agreeing to it. Moreover, the dissent cites to Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (1947), which stands for the proposition

that you can consent to having someone hit you, which would be a defense to a suit for battery. Id. 75 N.Y.S.2d at 365. Clearly you can. But someone who sticks his chin out and says, "hit me," still may have a claim if, after being hit and knocked down, he then is stomped into unconsciousness by his assailant. "[T]he physical attack must not exceed the consent." Van Vooren v. Cook, 75 N.Y.S.2d at 366. If Warner consented to anything, it was his, initial attendance at meetings as part of his probation. If he thereafter learned that he was embarking on a more insistent philosophical indoctrination than he anticipated, it cannot be said that he consented to that or, under the facts of this case, reasonably foresaw it. We therefore adhere to our earlier judgment.

APPENDIX C - Notice of Motion for Clarification of Order of Remand dated May 28, 1997

95-7055
Docket Number

ROBERT WARNER,

Plaintiff-Appellee,

-against-

ORANGE COUNTY DEPARTMENT OF PROGATION,

Defendant-Appellant.

Motion by:
RICHARD B. GOLDEN, ESQ.
County Attorney, Orange County
Orange County Department of Law
255-275 Main Street
Goshen, New York 10924

Opposing Counsel:
ROBERT N. ISSEKS, ESQ.
37 North Street
Middletown, New York 10940
(914) 344-4322

Has consent of opposing counsel:
A. been sought?
Yes
B. been obtained?
Yes

Has service been effected?
Yes

Is oral argument desired?
No

Requested return date: N/A

Brief statement of the relief requested: Clarification of May 14, 1997 Order of Remand

By: s/Richard B. Golden
RICHARD B. GOLDEN

Appearing for:
Orange County Department of Probation

Appellant or Petitioner:
Defendant

Date: May 21, 1997

IT IS HEREBY ORDERED that the motion be and it hereby is granted.
The opinion of the court was filed originally on September 9, 1996, and was amended on May 14, 1997. That opinion, in both its original and its amended form, has been vacated by the Order of Remand dated May 14, 1997. No opinion remains outstanding.

FOR THE COURT:
GEORGE LANGE III, Clerk
by:
s/Beth J. Meador
Beth J. Meador, Administrative Atty.

Date: May 28, 1997

UNITED STATES COURT OF APPEALS
FILED: MAY 28, 1997

Appendix D: 115 F.3d 1068

Robert WARNER, Plaintiff-Appellee,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION,
Defendant-Appellant.

No. 1760, Docket 95-7055.

United States Court of Appeals,
Second Circuit.

Argued July 20, 1995.

Decided Sept. 9, 1996.
As Amended May 14, 1997.
Order Vacating Decision and
Remanding Case May 14, 1997.

Probationer brought § 1983 action against county probation department, alleging that probation condition requiring his attendance at Alcoholics Anonymous (A.A.) meetings violated First Amendment establishment clause due to A.A.'s religious content. The United States District Court for the Southern District of New York, Goettel, J., 870 F.Supp. 69, found probation department liable for nominal damages of one dollar. Probation department appealed. The Court of Appeals, Leval, Circuit Judge, held that: (1) neither fact that sentencing judge was responsible for imposing conditions of probation, nor conduct of those who led A.A. meetings, was superseding cause that would relieve probation department of liability for recommending A.A. attendance as condition of probation, but (2) remand was required for determination as to whether probationer's failure to object at sentencing to A.A.'s religious nature resulted in waiver of his claim.

Remanded.

Winter, Circuit Judge, issued dissenting opinion.

Robert N. Isseks, Goshen, NY (Alex Smith, Middletown, NY, of counsel), for Plaintiff-Appellee.

Richard B. Golden, Orange County Attorney, Goshen, NY (M. Kevin Coffey, Antoinette Gluszak, Laurie T. McDermott, of counsel), for Defendant-Appellant.

Before: WINTER, LEVAL, and CALABRESI, Circuit Judges.

LEVAL, Circuit Judge:

Orange County Department of Probation ("OCDP"), the defendant, appeals from a decision of the district court awarding declaratory judgment, nominal damages of one dollar, and attorney's fees to plaintiff Robert Warner in his civil action under 42 U.S.C. § 1983. Warner claimed that a probation condition imposed on him as part of a criminal sentence, which required him to attend meetings of Alcoholics Anonymous ("A.A."), forced him to participate in religious activity in violation of the First Amendment's Establishment Clause, and that OCDP was responsible, in part because it recommended the A.A. therapy to the sentencing court as a condition of probation. OCDP contends it cannot be liable for Warner's exposure to A.A. pursuant to a sentence imposed by the court. We reject OCDP's arguments, and affirm the judgment.

Background

On November 13, 1990, Warner pleaded guilty to driving drunk and without a license in violation of New York law. N.Y. Veh. & Traf. Law §§ 511(2), 1192(1)(McKinney 1986 & Supp.1996). This was his third alcohol-related driving offense

a period of little more than a year. Judge David L. Levinson, of the Town of Woodbury's Justice Court in Orange County, New York, accepted the plea and ordered the Orange County Department of Probation to prepare a presentence report.

The OCDP's report recommended a term of probation with six special conditions, which the department routinely recommends in cases of defendants with alcohol problems. These included that the probationer "totally abstain from the use of intoxicating beverages," avoid "establishment[s] where the primary business is the sale or consumption of alcohol," and, as the fifth condition, that he "attend Alcoholics Anonymous at the direction of [his] probation officer."

These recommended special conditions were set forth on a standard form rider which OCDP routinely provided to sentencing judges in such cases. Judge Levinson sentenced Warner to three years of probation, imposing the special conditions recommended by the OCDP. In imposing these special conditions, Judge Levinson endorsed the Probation Department's standard form.

Warner attended A.A. meetings at the direction of his probation officer, Neal Terwilliger, from November 1990 through September 1992. However, in January of 1991, Warner complained to Terwilliger that, as an atheist, he found the religious nature of the A.A. meetings objectionable. The probation officer instructed Warner to continue his attendance. Some months later, Terwilliger determined that Warner lacked sufficient commitment to the program; he directed Warner to attend "Step meetings" and to seek another more advanced A.A. member as a "sponsor" to give him guidance and encourage his adherence to the program. The Step meetings were devoted to discussion of A.A.'s "Twelve Steps," which represented the heart of the therapy program.

The district court found that the program Warner was required to attend involved a substantial religious component. For example, the "Twelve Steps" included instruction that participants should "believe that a Power greater than ourselves could restore us"; "[make] a decision to turn our will and our lives over to the care of God as we [understand] Him "; "[a]dmit[ ] to God ... the exact nature of our wrongs"; be "entirely ready to have God remove all these defects ... [and] ask Him to remove our shortcomings"; and "[seek] through prayer and meditation to improve our conscious contact with God, as we [understand] Him."

Group prayer was a common occurrence at the meetings Warner attended. They frequently began with a religious invocation, and always ended with a Christian prayer. The district court found that the program "placed a heavy emphasis on spirituality and prayer, in both conception and in practice."

In July of 1992, Warner filed a motion in the Town of Woodbury Justice Court challenging the constitutionality of his consignment to A.A. The OCDP--after meeting with representatives from the local district attorney's office-- responded that it could offer Warner therapy in another program. The municipal court judge then directed that nonreligious alternatives be made available and dismissed Warner's motion as moot. Warner subsequently brought this action in federal district court, seeking damages, as well as a declaratory judgment that OCDP had violated his First Amendment rights. After a bench trial, the district court found that compelling Warner to attend the program violated the Establishment Clause, and further determined that the OCDP was liable for the constitutional injury, notwithstanding that it was the sentencing judge--not the Probation Department--who had imposed the condition of A.A. participation. The court, however, found that Warner's claims of financially compensable injury were not convincing, and thus

awarded nominal damages in the amount of one dollar, plus attorney's fees.

Discussion

OCDP asserts that the trial court committed a variety of errors. First, it claims that it cannot be liable because, under New York law, the determination of probation conditions is solely the responsibility of the sentencing judge. Second, it contests the district court's conclusion that requiring Warner to attend A.A. violated the Establishment Clause.[1] We disagree.

I. OCDP's Responsibility for the Sentence

To establish OCDP's liability for his sentence under 42 U.S.C. § 1983, Warner must first demonstrate that his injury resulted from a custom or policy of Orange County, as opposed to an isolated instance of conduct. Monell v. Department of Social Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-67, 90 S.Ct. 1598, 1611-13, 26 L.Ed.2d 142 (1970)(describing congressional intent in creating liability for custom or practice). The OCDP's recommendation that Warner be required to participate in A.A. therapy was unquestionably

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[1] In its reply brief on appeal, Orange County for the first time raised the question whether it might be immune from liability for the acts of its probation officer. Nothing in the record filed on appeal by the defendant indicates that Orange County ever raised a defense of immunity before the district court. What is more, the County's failure to raise the issue on appeal in its initial brief deprived Warner of the opportunity to dispute the question and deprived the court of the benefit of both sides' briefing. An issue raised for the first time on appeal is not properly before this court, and we will not consider it. Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); Hutton Const. Co., Inc. v. County of Rockland, 52 F.3d 1191, 1193 (2d Cir.1995).

made pursuant to a general policy. This was one of six standard special conditions set forth on a form captioned "Additional Conditions of Probation Pertaining to Alcohol," which OCDP routinely submitted to sentencing judges in alcohol cases.

OCDP argues that it is nonetheless not legally responsible because it was the judge's sentencing decision, not the Probation Department's recommendation, that caused the harm. The County is certainly correct that in cases brought under § 1983 a superseding cause, as traditionally understood in common law tort doctrine, will relieve a defendant of liability. Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir.), cert. denied, 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 114 (1995); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir.1989); Wagenmann v. Adams, 829 F.2d 196, 212 (1st Cir.1987). "[T]he Supreme Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under section 1983." Buenrostro v. Collazo, 973 F.2d 39, 45 (1st Cir.1992); see Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 1098 n. 7, 89 L.Ed.2d 271 (1986); Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961).

However, tort defendants, including those sued under § 1983, are " 'responsible for the natural consequences of [their] actions.' " Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484). As the First Circuit has explained, an actor may be held liable for "those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." Gutierrez-Rodriguez, 882 F.2d at 561 (citations omitted).[2]

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[2] The First Circuit went on to state: A negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have "directly" caused the harm. An "unforeseen and abnormal" intervention, on the other hand, "breaks the

A complex chain of events led to Warner's participation in religious exercises at the A.A. meetings. Two candidates present themselves as possible superseding causes of his injury that might relieve OCDP of liability: First, as the County argues, the judge's sentencing determination; second, the actions of the A.A. chapter that Warner attended.

A. Act of the Sentencing Judge

As the OCDP correctly points out, under New York law the determination of probation terms is a judicial task, which may not be delegated to probation officers. People ex. rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965); see also People v. Fuller, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 256, 441 N.E.2d 563 (1982)(sentencing court must independently decide how much of probation department report to adopt). The probation department therefore argues that its role was purely advisory, and cannot have been the proximate cause of Warner's injury.

The Supreme Court, however, in Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), rejected a similar argument. Malley was a civil rights action under § 1983 against a state trooper who had procured a warrant for the plaintiff's

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chain of causality," thus shielding the defendant from liability. See also Stagl v. Delta Airlines, Inc., 52 F.3d 463, 473-74 (2d Cir.1995)(under New York law liability turns upon whether the intervening act is "a normal and foreseeable consequence of the situation created by the defendant's negligence")(quoting Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980)); Bonsignore v. City of New York, 683 F.2d 635, 638 (2d Cir.1982)(same); White v. Roper, 901 F.2d 1501, 1506 (9th Cir.1990); Marsh v. Barry, 824 F.2d 1139, 1143 (D.C.Cir.1987)(question in § 1983 case where intervening cause is alleged is "whether the resulting harm was reasonably foreseeable"); Springer v. Seaman, 821 F.2d 871, 876-77 (1st Cir.1987); Restatement (Second) Torts §§ 442A, 442B, 443, 447 (1965).

arrest by submitting an affidavit. Plaintiff claimed the affidavit was legally insufficient. The district court had dismissed the case, believing the police officer to be absolutely immune when swearing out a warrant. The Court of Appeals reversed, resuscitating the action. The officer argued in the Supreme Court not only that he was immune, but also that he was shielded from responsibility by his entitlement to rely on the judgment of the judicial officer in finding probable cause and issuing the warrant. The Supreme Court ruled that such reliance was not justified if "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Id. at 345, 106 S.Ct. at 1098. If such was the case, the officer's application for a warrant was not objectively reasonable, because it risked an unnecessary danger of unlawful arrest. "It is true," the Court observed,

> that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this damage by exercising reasonable professional judgment.

Id. Commenting on the claim that the judge's decision to issue the warrant broke the "causal chain" between the application and the wrongful arrest, the Court noted that such an argument was "inconsistent with our interpretation of § 1983," which makes defendants " 'responsible for the natural consequences of [their] actions.' " Id. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484); see also Gutierrez-Rodrigue z, 882 F.2d at 561 (defendants in § 1983 cases liable for consequences caused by "reasonably foreseeable intervening forces").

The circumstances in Malley were more favorable than those here to the argument of exoneration by reason of the intervening decision of the judge. That is because a police officer applying for an arrest warrant appears in a partisan role. The magistrate to whom the application is addressed is automatically on notice that the application comes from an interested party and therefore knows that scrutiny is warranted. The probation officer, on the other hand, is not a partisan advocate aligned with either the prosecution or the defendant. He is a neutral adviser to the court.[3] Schiff v. Dorsey, 877 F.Supp. 73, 77 & n. 1 (D.Conn.1994) (describing analogous role of federal probation officer; "the sentencing judge's need for complete and accurate information about an offender requires that he enjoy a relationship of the utmost trust and confidentiality with the federal probation officer"); see also Sharon Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 105 Yale L.J. 933, 945 (1995) (describing historical role of probation officer as "neutral information gatherer with loyalties to no one but the court"). The district court noted a high likelihood of court adoption of such recommendations by the probation department.

Given the neutral advisory role of the probation officer toward the court, it is an entirely "natural consequence[ ]," Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7, for a judge

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[3] New York law prohibits a court from sentencing a defendant to a term of probation not agreed upon by the parties without first considering the probation department's pre-sentence report ("PSR"). N.Y.Crim. Proc. § 390.20 (McKinney 1994). PSRs include not only material the department thinks appropriate, but also any other information the court may direct the investigation to include. Id. at § 390.30(3)(a). Once written, PSRs become confidential court documents. Id. at § 390.50(1). Although not formally located within the judicial branch, Bowne v. County of Nassau, 37 N.Y.2d 75, 371 N.Y.S.2d 449, 452, 332 N.E.2d 323 (1975), New York statutes intimately tie the probation department to the sentencing process.

to adopt the OCDP's recommendations as to a therapy provider without making an independent investigation of the qualifications and procedures of the recommended provider. Such action by a judge is neither "abnormal" nor "unforeseen." Gutierrez-Rodriguez, 882 F.2d at 561.

Court adoption of the probation officer's recommendation is particularly likely when the recommendation deals with a provider of therapy. Judges are unlikely to possess particularized information about the relative characteristics and merits of different providers of therapy. For this type of information, courts generally rely heavily on probation department recommendations.[4]

Whether it was reasonably foreseeable that the sentencing judge would adopt the OCDP's recommendation that Warner attend A.A. is a question of fact. See Springer, 821 F.2d at 876; Restatement (Second) of Torts § 453 cmt. b (1965). The district

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[4] The dissent suggests that we malign New York's judiciary by finding that the sentencing judge merely "rubber stamped" the probation office recommendation. We neither find nor imply any such thing. First, to say, as we do, that it was reasonably foreseeable that the sentencing judge would accept probation's recommendation on this point does not imply that the judge did not make his own determination. Second, our discussion relates only to the selection of a therapy provider and not at all to the court's determination of appropriateness of probation and of alcohol therapy. The selection of a provider of therapy is not an issue of law, and courts are ill equipped to perform this task without relying heavily on recommendations. For sentences involving alcohol abuse therapy, furthermore, the probation department's role is particularly significant. New York law allows a judge to sentence a defendant to a term of probation conditioned on "participat[ion] in an alcohol ... abuse program ... approved by the court after consultation with the local probation department having jurisdiction, or such other public or private agency as the court determines to be appropriate." N.Y. Penal § 65.10(2)(e)(emphasis added). The statutory requirement that the judge seek advice in approving a particular alcohol abuse program suggests judicial reliance on the department's expertise in selecting a program.

judge found a high likelihood that a judge would follow such a recommendation of the probation department. We review this determination for clear error, and find none. Fed.R.Civ.P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105 S.Ct. 1504, 1510- 11, 84 L.Ed.2d 518 (1985).

Finally, the dissent argues that, because Warner--following the advice of his attorney--sampled the A.A. sessions prior to sentence and made no objection to their religious content at the time of sentence, the probation department's recommendation was not a proximate cause of the injury. The dissent argues also that Warner's conduct constituted consent. We are not persuaded by either argument.

In the first place, both arguments turn on a factual question. Any ruling that Warner consented to the religious conditions of his probation, or knowingly declined to object to them, must depend on a factual finding that Warner, in his few sessions at A.A. prior to sentencing, had learned the nature and extent of the religious content of the program. If Warner was unaware of that content or the extent of its presence in the treatment, he cannot be expected to have objected or appealed on that basis. There was no finding by the district judge, however, that Warner did have such knowledge, and the record provides scant evidence upon which such a finding could have been based.

There was very little effort by the County at trial to explore Warner's awareness before sentence of the religious nature of the program. The evidence showed merely that Warner had attended about four meetings, that the Twelve Steps had been posted on a billboard and had been discussed, and that the meetings ended in a prayer. Thus, while Warner was on notice that the program had some religious content, there was no showing that he was aware, prior to sentence, of its degree or intensity. The evidence suggests that his awareness increased later on when his probation officer, finding that he lacked

commitment, directed him to attend "step meetings" (where the Twelve Steps were more intensively discussed) and to obtain a "sponsor" within the program. The dissent's conclusion that Warner consented is not based on any factual finding by the district court. Nor is it based on evidence that compels such a finding.

Had Warner either suggested A.A. as a condition of probation, or somehow communicated his agreement to such a condition, different considerations would apply. But the mere fact of his brief presentence attendance, designed to demonstrate his commitment to rehabilitation, did not amount to a consent to the aspect of the sentence that essentially required him to attend religious exercises.[5] A defendant facing sentence may well undertake daily attendance at mass in the hope of convincing the sentencing judge of his penitence. We do not see how such conduct, without more, could be construed as consent to a sentence of probation conditioned on daily attendance at mass.

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[5] The Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), does not bar Warner's § 1983 claim. Heck ruled that a prisoner's claim for damages based on his allegedly unconstitutional prosecution and conviction was not cognizable under § 1983 because his conviction had not been invalidated. Id. at 486-87, 114 S.Ct. at 2372. Heck 's rule bars a state convict from suing under § 1983 when his conviction remains outstanding and cannot be reconciled with his claim under § 1983. The rule applies most clearly where the defendant has been convicted of a crime, but contends in his § 1983 action that he was prosecuted for an unconstitutional reason. Such a defendant's outstanding conviction demonstrates that he was prosecuted with good reason. These considerations have no application to Warner's case. His guilt is in no way incompatible with his claim that he may not lawfully be required to take alcohol therapy in a religious program. But more importantly, there can be no incompatibility because the illegal part of Warner's sentence had been eliminated before he brought his § 1983 action. There is no suggestion in Heck that his suit may not be maintained in these circumstances.

B. Acts of Alcoholics Anonymous

The immediate cause of Warner's injury was not the sentencing judge's decision to send him to an alcohol rehabilitation program, but rather the actions of those who conducted the A.A. meetings Warner attended. Whether the religion-infused meetings should be regarded as a break in the causal chain between OCDP's action and plaintiff's injury, thus shielding the probation department from liability, depends, again, upon whether those actions were reasonably foreseeable to OCDP at the time it made the recommendation. Gutierrez-Rodriguez, 882 F.2d at 561; see also Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7.

On this point, the district court made no findings. The probation department was, of course, obligated to use reasonable care to inform itself of the suitability of therapy programs it recommended to the court, especially where such recommendations were repeatedly made as a matter of policy. Furthermore, the parties stipulated prior to trial that OCDP, when it formulated its policy of recommending A.A., was aware of the program's Twelve Steps and of their religious character. Accordingly, there can be no question as to the reasonable foreseeability of the religious nature of the program OCDP was recommending for Warner; OCDP was well aware of it. The actions of A.A. cannot be considered to have broken the chain of causation. OCDP is responsible for any resulting injury to Warner's First Amendment rights.

II. Establishment Clause

The County also argues that forcing Warner to attend Alcoholics Anonymous did not violate the First Amendment's Establishment Clause. We disagree. The Supreme Court has repeatedly made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support

or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " Lee v. Weisman, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361- 62, 79 L.Ed.2d 604 (1984)); see County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591, 109 S.Ct. 3086, 3099-3100, 106 L.Ed.2d 472 (1989); Everson v. Board of Educ., 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947); see also Katcoff v. Marsh, 755 F.2d 223, 231-32 (2d Cir.1985) (observing that army chaplaincy program "meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma").

The A.A. program to which Warner was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer. The trial judge reasonably found that it "placed a heavy emphasis on spirituality and prayer, in both conception and in practice." We have no doubt that the meetings Warner attended were intensely religious events.[6]

There can be no doubt, furthermore, that Warner was coerced into participating in these religious exercises by virtue of his

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[6] As noted above, the district court made no finding on OCDP's awareness of the religious nature of the A.A. program. We nonetheless found OCDP's responsibility by reason of the stipulation of the parties that OCDP knew the religious nature of A.A.'s Twelve Steps. The district judge's finding of a violation of the Establishment Clause was based in part on several factors, recited above, that were not included in the Stipulation covering OCDP's knowledge--particularly the prayers. Although there was no finding that OCDP knew (or should have known) of the prayers, the finding of Establishment Clause violation and of OCDP's responsibility are adequately supported by the stipulated facts.

probation sentence. Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs. The probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content. Once sentenced, Warner had little choice but to attend the A.A. sessions. If Warner had failed to attend A.A., he would have been subject to imprisonment for violation of probation. See N.Y. Penal Law §§ 60.01(4), 65.00(2) (McKinney 1987); N.Y. Veh. & Traf. Law §§ 511(2), 1192(1) (McKinney 1986 & Supp.1996).

Had Warner been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different. Our ruling depends, as in Lee, on the "fundamental limitation[ ] imposed by the Establishment Clause" that bars government from "coerc[ing] anyone to support or participate in religion or its exercise." 505 U.S. at 587, 112 S.Ct. at 2655. In circumstances similar to our case, the New York Court of Appeals recently reached the same conclusion. Griffin v. Coughlin, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), cert. denied, --- U.S. ----, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997). In Griffin, the New York court held that a prisoner's family visiting privileges may not be conditioned on participation in a treatment program that adopts the "religious oriented practices and precepts of Alcoholics Anonymous." Id. at 904, 673 N.E.2d 98. The court emphasized that it was not proscribing A.A. programs offered to prisoners on a voluntary basis. Id. at 915, 673 N.E.2d 98. It was the coercive circumstances, conditioning a desirable privilege on the prisoner's participation in a religious program, without alternative, that drove the New York court to find a violation of the Establish-

ment Clause.[7] Similarly, the Seventh Circuit has ruled recently that where inmates were required to attend a substance abuse program with explicit religious content on pain of being rated a higher security risk and suffering adverse parole effects, the state impermissibly coerced participation in a religious program in violation of the Establishment Clause. Kerr v. Farrey, 95 F.3d 472 (7th Cir.1996)("[I]n general, a coercion-based claim indisputably raises an Establishment Clause question." Id. at 479).

Orange County argues that even if Warner was forced to attend the meetings, he was not required to participate in the religious exercises that took place. The County argues that, as a mature adult, Warner was less susceptible to such pressure than the children who were required to stand in respectful silence during a school prayer in Lee v. Weisman, 505 U.S. at 591-95, 112 S.Ct. at 2658-59; it points out that the Supreme Court expressly questioned whether the obligation imposed by the school in Lee might have been constitutionally tolerable "if the affected citizens [had been] mature adults." Id. at 593, 112 S.Ct. at 2658.

We do not find Orange County's argument convincing. Although it is true Warner was more mature, his exposure was more coercive than the school prayer in Lee. The plaintiff in Lee was subjected only to a brief two minutes of prayer on a single occasion. Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal--"Thirteen Stepping" in A.A. parlance--the probation officer

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[7] See also O'Connor v. California, 855 F.Supp. 303 (C.D.Cal.1994)(no Establishment Clause violation where probationers were offered a choice between A.A. and a secular program).

required that he attend "Step meetings" to intensify his motivation. Warner was also paired with another member of A.A. as a method of enhancing his indoctrination into the group's approach to recovery from alcoholism. Most importantly, failure to cooperate could lead to incarceration. The fact that Warner managed to avoid indoctrination despite the pressure he faced does not make the County's program any less coercive, nor nullify the County's liability.

The County argues further that the non-sectarian nature of the A.A. experience immunizes its use of religious symbolism and practices from Establishment Clause scrutiny. The argument is at the very least factually misleading, for the evidence showed that every meeting Warner attended included at least one explicitly Christian prayer. Furthermore, the claim that non-sectarian religious exercise falls outside the First Amendment's scrutiny has been repeatedly rejected by the Supreme Court. As the Court made clear in Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), "a principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion." Id. at 703, 114 S.Ct. at 2491; see also Allegheny, 492 U.S. at 591, 109 S.Ct. at 3099-3100; School Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-17, 83 S.Ct. 1560, 1568-69, 10 L.Ed.2d 844 (1963).

Similarly, the County's reliance on Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), is unavailing. In Marsh, the Supreme Court held that the Nebraska state legislature did not violate the Establishment Clause by commencing its sessions with a sectarian prayer. That opinion relied heavily on the long tradition of public prayer in this context. Id. at 786-90, 795, 103 S.Ct. at 3333-35, 3338 (noting "unbroken practice for two centuries in the National Congress"). The Court in Lee noted the significant differences between the opening ceremony of a state legislative session where adults are free to

"enter and leave with little comment and for any number of reasons" and the powerful emotional compulsion for a child to be present at her high school graduation. Lee, 505 U.S. at 595-97, 112 S.Ct. at 2660. The differences between the invocation at a session of the state legislature and Warner's compulsory adherence to the A.A. program are even more obvious.[8]

Resolving questions as to the reach of the Establishment Clause "of necessity [requires] line-drawing, ... determining at what point a dissenter's rights of religious freedom are infringed by the State." Id. at 598, 112 S.Ct. at 2661. We conclude that the constitutional line was crossed here.

* * *

Notwithstanding our conclusion that Warner's First Amendment rights were violated, we have misgivings about awards of damages for such violations. At the time the Orange County Probation Department recommended sending Warner to A.A., there were no court decisions suggesting that this was an

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[8] The parties also offer analyses of this case within the framework of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Compare Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n. 7, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993)(noting ongoing viability of Lemon) with Lee, 505 U.S. at 643-45, 112 S.Ct. at 2685 (Scalia, J., dissenting)(noting criticism of Lemon) and Lamb's Chapel, 508 U.S. at 396-400, 113 S.Ct. at 2149-50 (Scalia, J., concurring)(same). Whatever other tests may be applicable in the Establishment Clause context, the Supreme Court has made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." Lee, 505 U.S. at 587, 112 S.Ct. at 2655. Because sending Warner to A.A. as a condition of his probation, without offering a choice of other providers, plainly constituted coerced participation in a religious exercise, we find a violation of the Establishment Clause.

abridgement of constitutional rights. Furthermore, it is clear that, in adopting its policy of sending alcoholic defendants like Warner to A.A., the department's purpose was not to promote religion but to help free alcoholics from addiction by sending them to a program that has been famously successful. In these circumstances, the arguments in favor of good faith immunity are impressive.[9] The prospect of heavy liabilities falling on well-intentioned officials or governmental entities for such conduct is an unhappy one. Furthermore, although the conduct of the OCDP is found to be impermissible under the Constitution, the injury suffered by Warner was minimal. The fact that a government agency acts in a manner forbidden by the Constitution does not necessarily mean that the "victim" has suffered a meaningful injury that would justify a sizeable damage award. The district court's assessment of Warner's damages at one dollar seems to us appropriate. Had substantial damages been awarded, we would have given serious thought to an order of remittitur.[10]

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[9] But see Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), which held that municipalities do not benefit from the qualified immunity of their officers. See also Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir.1983)(extending the rule of Owen regarding qualified immunity to find a municipality potentially liable for its officers' executive acts, though the officers themselves were protected by absolute immunity).

[10] See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (Consistent with Seventh Amendment's prohibition on reexamination of jury verdicts, once district court has applied proper legal standard in determining whether jury award is excessive, United States courts of appeals may review district court's denial of remittitur for abuse of discretion and direct grant thereof).

Conclusion

We have considered Orange County's other claims, and find them to be without merit. The judgment of the district court is affirmed.

WINTER, Circuit Judge, dissenting:

I respectfully dissent.

The pertinent facts concerning Warner's plea and sentencing are not in dispute. He was arrested and pled guilty to his third alcohol-related driving offense in a year. Prior to meeting with the probation officer who would recommend a sentence, Warner voluntarily began to attend Alcoholics Anonymous meetings. This was on the advice of his lawyer, who, according to Warner's testimony, believed "that the court would look upon me more favorably in the sentencing procedure if I can show that I was pursuing a program of rehabilitation." The probation officer subsequently recommended to the sentencing court that Warner continue his ongoing attendance at A.A. meetings as a special condition of probation. The sentencing judge, who is obliged by state law to make an independent sentencing decision, imposed that condition. Warner registered no objection at the sentencing hearing and took no appeal. Later, he moved the sentencing court to relieve him of any obligation to attend meetings with a religious component and was quickly accommodated with a nonreligious counseling program. Based on these facts, my colleagues hold that the county probation authority may be sued for damages under Section 1983 for violating the Establishment Clause.

My dissent is based on two of the available grounds. First, Warner forfeited or waived his claim or, applying tort law, consented to the probation officer's alleged intentional tort of recommending to the court attendance at A.A. meetings as a

condition of probation. Indeed, Warner voluntarily began attendance at A.A. meetings before any involvement by the probation office in order to convince the sentencing judge that his voluntary selection of this particular rehabilitative program obviated the need for a stiffer sentence. Moreover, the judge exercised his exclusive authority to determine what sentence should be imposed. The imposition of the sentence by the court was, therefore, an independent cause that superseded the recommendation of the probation officer in causing the injuries. Second, the invocation of the Establishment Clause, rather than the Free Exercise Clause, puts into play a principle that portends changes in our penal system that are not required, in my view, by the Constitution.

I

I turn first to the consent and causation issues.

This lawsuit is an instance of remarkable gall. Warner voluntarily selected and began attendance at A.A. meetings on the advice of counsel in order to impress the sentencing court with his determination to overcome his alcoholism. Now he complains that a subsequent recommendation of a probation officer that he attend such meetings entitles him to monetary damages.

Although we do not have the minutes of the sentencing hearing, Warner's testimony in the district court stated that his ostensible desire to attend A.A. meetings was to be used as a plus in his favor in persuading the sentencing court to be lenient. The judge thus imposed a condition of probation embraced by Warner on his own initiative. Warner never indicated to the sentencing court his view that a condition of probation requiring attendance at A.A. meetings rendered the proposed sentence unconstitutional. Nor did Warner appeal from the sentence imposed.

By any measure known to me, Warner's conduct was a forfeiture or waiver, see Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (objection waived absent showing of cause), just as the County's failure to assert the defense of immunity waived that issue. Even if we apply common law tort doctrine, Warner's conduct constituted consent to an intentional tort, a full defense under New York law. See Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (1947); see also Prosser and Keeton on the Law of Torts § 18. I would hold, therefore, that his claim for damages is barred.

Even if the principles relating to injuries caused by negligence relied upon by my colleagues are applied, Warner's claim fails. Warner's initiative in voluntarily selecting and attending A.A. meetings and his failure to bring his present claim to the court's attention were the cause of whatever constitutional harm he suffered from the recommendation of the probation officer.[11] As his successful petition for state collateral review under N.Y.Crim. Proc. L. § 440.20(1) and the recent decision in the New York Court of Appeals in Griffin v. Coughlin, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), demonstrate, relief was his for the asking.

I also cannot agree with the "finding" that the sentencing judge did not make the independent judgment required of him by state law, see People ex rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965), and that that judgment was not, in the jargon of negligence law, a superseding cause of Warner's injuries. In my view and that of others, see People ex rel. Brown v. La Vallee, 13 A.D.2d 556, 211 N.Y.S.2d 728, 729 (1961);

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[11] I do not mean to suggest that, if the constitutional challenge were unsuccessfully brought to the court's attention, Warner's suit against the probation authority would have merit. Rather, an appeal--to the United States Supreme Court if necessary--would have been in order.

Honeycutt v. Ward, 612 F.2d 36, 41 (2d Cir.1979), cert. denied, 446 U.S. 985, 100 S.Ct. 2969, 64 L.Ed.2d 843 (1980), a heavy presumption of correctness attends proceedings such as the one before us where no error was brought to the attention of the sentencing judge.[12] My colleagues, and the district judge, indulge in the contrary presumption, namely, that acceptance of the sentencing recommendation of a probation officer as to sources of treatment is merely "rubberstamping." They do this notwithstanding testimony that New York judges frequently reject special conditions of probation recommended by probation authorities.[13] They also ignore the possibility that recommendations of probation officers may be tailored to the known views of judges, creating a false appearance of rubberstamping.[14]

Moreover, as noted, the record is not silent as to whether the particular sentencing judge would have imposed the requirement of attendance at A.A. meetings had Warner indicated his

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[12] I need not reach the issue given the facts of this case, but there is a strong argument to be made that, where the sentencing judge cannot under state law delegate the power to determine a sentence to probation officers--as in New York--an illegal delegation is itself a superseding cause and a defendant's remedy is an appeal rather than a Section 1983 action.

[13] My colleagues rely upon N.Y. Penal Law § 65.10(2)(e) regarding the requirement that a court consult with the local probation authority regarding selection of an alcohol abuse program. Because this provision requires that the consultation be with the probation authority "or ... other public or private agency," it does not give any special status to probation authorities over other sources of information.

[14] I believe this presumption to be rather unfair to state court judges. They lack any practical method of responding to the conclusion that they abdicated responsibility, at least short of asking to testify in the federal proceeding that "I was indeed following the law, just as the record indicates."

concerns about the religious aspects of A.A. In fact, it fairly shouts that the judge would have rejected the condition. After sentencing, Warner complained to the probation officer about the religious aspects of A.A. At this point, of course, the officer lacked power to alter the sentence.[15] Warner then, for the first time, challenged the sentence by filing a petition under N.Y.Crim. Proc. L. § 440.20(1) (McKinney 1995) to set aside the pertinent part of his sentence on the ground that it was invalid. The court ruled that Warner could comply with the conditions of probation by going to a non-religious alcohol counseling program and denied the petition as moot. Indeed, Warner's complaint alleged that "[a]s a result of the Town of Woodbury Justice Court's Decision and Order, plaintiff is currently no longer required by his probation officer to participate in Alcoholics Anonymous but is, instead, required to attend an alternative program." In short, Warner's own papers indicate that as soon as the judge was alerted to Warner's distaste for the religious aspects of A.A., the judge immediately altered that condition of probation. That being the case, the record support for the finding that the judge merely rubberstamped the recommendation of the probation officer is not apparent to me.

Furthermore, another finding, not made by my colleagues, is necessary to establish the recommendation of the probation officer as the legal cause of Warner's injuries. To reach my colleagues' conclusion, we would also have to find that an appeal

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[15] One of Warner's original theories was that the sentence vested discretion in the probation officer to vitiate the requirement of A.A. attendance and that the probation officer's exercise of discretion in requiring continued attendance, rather than the original recommendation, was the basis of liability. The district court and my colleagues focus instead on the recommendation. Because I read the sentence to vest discretion to excuse further A.A. attendance only upon a completed rehabilitation and not for other reasons, such as a probationer's distaste for the religious aspects of the program, I agree that the focus should be on the recommendation.

from the sentence would have been fruitless because the New York appellate courts would simply not have given any consideration whatsoever to Warner's constitutional challenge out of blind and unhesitating deference to the recommendation of the Orange County probation officer. Quite the contrary, we now know that relief was available. See Griffin.

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), works against Warner. The procuring of a search warrant is not an adversary proceeding, much less one like sentencing, in which the subject has a constitutional right to counsel and a hearing on the merits. Because the magistrate issuing a warrant is not subject to adversary argument revealing flaws in the application and affidavit, the magistrate's intervening decision does not immunize the officer's unreasonable conduct. Malley simply has no application to a proceeding that is adversary and subject to immediate appellate review.

II

I now turn[16] to the use of the Establishment Clause to invalidate a condition of probation that requires attendance at A.A. meetings. I will assume that the religious aspects of A.A. are sufficient to trigger a violation of either the Establishment or Free Exercise Clause if the other requisites of such claims are met. Nevertheless, I do not agree that the Establishment Clause provides a basis for relief to Warner.

In finding an Establishment Clause violation, my colleagues rely heavily upon the fact the probation authority did not

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[16] I do not reach the immunity issues. I do note, however, that the immunity of probation officers is generally believed to be derived from judicial immunity. See Dorman v. Higgins, 821 F.2d 133, 136-37 (2d Cir.1987).

recommend to the sentencing court that Warner have a choice between A.A. and a non-religious rehabilitation program. As a result, he was, in their view, coerced into participation in A.A. (In my view, of course, he freely chose A.A.) Although, as my colleagues point out, coerced participation in religious ceremonies may be a factor in finding an Establishment Clause violation, see Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it is not a necessary element of such a claim, and a choice among all available options is not a remedy for a valid Establishment Clause claim.

Relevant Establishment Clause precedent bars governmental endorsement and support of religion even in contexts in which no coercion exists. The "preservation and transmission of religious beliefs and worship is ... committed to private sphere," Lee at 589, 112 S.Ct. at 2656, and government may not support religious practices even when those engaged in them have freely chosen to do so. Government may not aid "a single religion or religion generally," School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985), but must "maintain a course of neutrality among religions, and between religion and nonreligion." Id. A law that merely facilitates citizens in the practice of their religion may, therefore, be invalid even though no non-believer is negatively affected--even as a taxpayer. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

If attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion. Following the logic of Establishment Clause jurisprudence, it would seem to me that such a condition is a violation whether or not the only person directly affected, the probationer, preferred a religiously oriented program over a secular one. The lack of governmental neutrality is precisely what caused the Supreme

Court in Grumet to strike down a state law establishing a school district for the Village of Kiryas Joel, which was populated only by persons with a common religion. And, in Lee, surely the plaintiff's constitutional claim could not be satisfied by an offer of an additional ceremony at the high school graduation allowing speakers of her choice to express whatever spiritual or atheistic views--or disagreements with the spiritual or atheistic views of others--that were congenial to her.

Establishment Clause logic, if followed, therefore, would endanger any number of ubiquitous penal programs that are, in my view, clearly permissible. To take just two common examples, prisons may have chaplains, who systematically offer religious counseling, services, and other programs to prisoners. They may be selected, paid, and even monitored by state officials. Also, sentences to community service may involve service at soup kitchens, many of which are operated by churches where a meal begins with a prayer and religious tracts are distributed.

None of the programs described above violate the Establishment Clause in my view. Applying the three-part test established in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), each has a secular purpose in that they all further rehabilitation in one way or another. None have as a principal or primary effect the advancement or inhibition of religion. Any such effect is incidental. Finally, they do not lead to excessive entanglement of the government in religion. I very much doubt that substantial disagreement exists over this point. The state's control over the lives and activities of prisoners certainly justifies its making religious programs available to them. Indeed, under our caselaw, a state must offer some congregate programs of a sectarian nature. See Salahuddin v. Coughlin, 993 F.2d 306 (2d Cir.1993); Young v. Coughlin, 866 F.2d 567, 570 (2d Cir.), cert. denied, 492 U.S. 909, 109 S.Ct. 3224, 106 L.Ed.2d 573 (1989). However, I also see no differ-

ence between the penal programs described above and Warner's sentence so far as the Establishment Clause--in contrast to the Free Exercise Clause--is concerned.

To be sure, my colleagues do not hold that attendance at A.A meetings can never be a condition of probation. Indeed, they expressly state that Warner should have been given a choice, a statement I take to mean that persons facing a sentence for alcohol-related offenses may constitutionally be offered a choice between A.A. meetings (or other religiously-based rehabilitation programs) and alternative secular programs as a condition of probation. My disagreement is simply over whether such a choice is required, or even permitted, by the Establishment Clause.

I hasten to add that I do not view compulsory activity with a substantial religious component as a valid penal measure, at least where equally effective secular rehabilitative programs are available.[17] See O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (restriction on free exercise rights must be reasonably related to valid penalogical interest). Compulsory attendance at religious ceremonies as part of a penal sentence surely raises serious issues under the Free Exercise Clause and might well require the provision of a choice between secular and sectarian programs. Warner makes no Free Exercise claim, however.

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[17] It is conceivable that in some areas the only rehabilitative program available, e.g., A.A., has some religious content.

III

This is a decision with important ramifications. It transports tort doctrine of proximate cause and foreseeability drawn from the law of negligence to the judicial process. In so doing, it fails to give any recognition to the more appropriate rules governing intentional torts, to the power of a party to a court proceeding to avoid harm by raising objections and taking appeals, or to the role of the judge as an independent decisionmaker. It thus may have implications for advocates as well as for those who advise judges. See Note 6, supra. It also brings to sentencing, probation, and penal institutions Establishment Clause doctrine that may not be easily cabined.

At a practical level, my colleagues' decision exposes every probation authority in this circuit to suits for damages and attorney's fees in virtually every case in which a recommendation of attendance at A.A. meetings has been made and accepted within the statute of limitations period, if no available alternative was offered and such recommendations were commonly made. Liability will follow no matter whether the defendant ever brought the constitutional issue to the attention of the sentencing court. Other claims of unconstitutional recommendations under Section 1983 will follow notwithstanding failure to make objections to sentencing courts.

I therefore respectfully dissent.

ORDER OF REMAND

The district court found that Orange County had infringed Warner's rights under the First Amendment when the County's probation department, in accordance with its policy, recommended that Warner attend Alcoholics Anonymous as a condition of his probation. In so doing, the court made no findings as to whether Warner, by failing to object at the time of his

sentence or to appeal, had consented, waived or forfeited objection to the religious nature of the A.A. program. Nor was the issue raised by the County in its appeal. The dissenting opinion in the appeal argued that Warner's voluntary presentence attendance at A.A. meetings gave him sufficient awareness of the extent of their religious content that his failure to object at the time of sentencing or to appeal should be construed as a consent or waiver. On petition for rehearing (with suggestion for rehearing in banc), judges of this court have expressed an interest in whether Warner, by failing to appeal his sentence, waived or forfeited the right to seek damages under § 1983, and in whether the County raised the issue at trial.

Although we have found no indication in the record on appeal that the County sought a determination of these questions at trial,[18] that record may be incomplete. (A record on appeal does not necessarily show all argument before the district court.) We accordingly remand to the district court for consideration of the following questions:

1. Whether the County asserted at trial the contention that Warner's failure to object at sentencing or appeal from his sentence constituted consent to the religious content of the Alcoholics Anonymous program, or effective waiver or forfeiture of his claim in this action.

2. Whether Warner was sufficiently aware at the time of his sentence of the extent of the religious practices of the A.A. meetings that his failure to object to, or appeal from, his sentence should be deemed a consent, or a waiver or forfeiture of his

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[18] By its pleadings and by motion for summary judgment, the County did raise a different question--whether Warner's § 1983 claim is barred by collateral estoppel because he had previously attacked the legality of his sentence in his state court motion to be relieved of attendance at A.A.

claim under § 1983. (Even if the County did not raise this contention at trial, the court should conduct a hearing on it so as to insure that both parties have an adequate opportunity to present evidence on the question, following which the court should make findings.)

The opinion of this court filed on September 9, 1996, as amended on May 14, 1997 is vacated.

The district court's findings may or may not lead it to amend its judgment. If the district court does not modify the judgment, then upon the filing of its findings, either party may restore the case to this court's jurisdiction by a letter to the Clerk of the court, submitted within twenty days of the district court's filing of its findings. See United States v. Jacobson, 15 F.3d 19, 22 (2d Cir.1994)(appellate court may seek supplementation of the record from the district court by issuing a mandate stating conditions that will restore appellate jurisdiction). If the district court does enter a modified judgment, a party seeking appellate review of the modified judgment should proceed by notice of appeal. In either event, the case shall be referred to this panel upon its return to this court's jurisdiction.

Judge WINTER has asked us to state that for reasons set forth in his dissent he sees no reason for a remand and does not concur in this order.

Appendix E: 95 F.3d 202

Robert WARNER, Plaintiff-Appellee,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION,
Defendant-Appellant.

No. 1760, Docket 95-7055.

United States Court of Appeals,
Second Circuit.

Argued July 20, 1995.

Decided Sept. 9, 1996.

Editor's Note: The opinion of the United States Court of Appeals, Second Circuit, in Warner v. Orange County Dept. of Probation, published in the advance sheet at this citation, 95 F.3d 202, was withdrawn from the bound volume because rehearing is pending. For Superseding Opinion, see 1997 WL 321553.

Robert N. Isseks, Goshen, NY (Alex Smith, Middletown, NY, of counsel), for Plaintiff-Appellee.

Richard B. Golden, Orange County Attorney, Goshen, NY (M. Kevin Coffey, Antoinette Gluszak, Laurie T. McDermott, of counsel), for Defendant-Appellant.

Before: WINTER, LEVAL, and CALABRESI, Circuit Judges.

LEVAL, Circuit Judge:

Orange County Department of Probation ("OCDP"), the defendant, appeals from a decision of the district court awarding

declaratory judgment, nominal damages of one dollar, and attorney's fees to plaintiff Robert Warner in his civil action under 42 U.S.C. § 1983. Warner claimed that a probation condition imposed on him as part of a criminal sentence, which required him to attend meetings of Alcoholics Anonymous ("A.A."), forced him to participate in religious activity in violation of the First Amendment's Establishment Clause, and that OCDP was responsible, in part because it recommended the A.A. therapy to the sentencing court as a condition of probation. OCDP argues on several grounds that it cannot be liable for Warner's exposure to A.A. pursuant to a sentence imposed by the court. We reject OCDP's arguments, and affirm the judgment.

Background

On November 13, 1990, Warner pleaded guilty to driving drunk and without a license in violation of New York law. N.Y.Veh. & Traf.Law §§ 511(2), 1192(1) (McKinney 1986 & Supp.1996). This was his third alcohol-related driving offense in a period of little more than a year. Judge David L. Levinson, of the Town of Woodbury's Justice Court in Orange County, New York, accepted the plea and ordered the Orange County Department of Probation to prepare a presentence report.

The OCDP's report recommended a term of probation with six special conditions, which the department routinely recommends in cases of defendants with alcohol problems. These included that the probationer "totally abstain from the use of intoxicating beverages," avoid "establishment[s] where the primary business is the sale or consumption of alcohol," and, as the fifth recommended condition, that he "attend Alcoholics Anonymous at the direction of [his] probation officer."

These recommended special conditions were set forth on a standard form rider which OCDP routinely provided to sentencing judges in such cases. Judge Levinson sentenced Warner to

three years of probation, imposing the special conditions recommended by the OCDP. In imposing these special conditions, Judge Levinson endorsed the Probation Department's standard form.

Warner attended A.A. meetings at the direction of his probation officer, Neal Terwilliger, from November 1990 through September 1992. However, in January of 1991, Warner complained to Terwilliger that, as an atheist, he found the religious nature of the A.A. meetings objectionable. The probation officer instructed Warner to continue his attendance. Some months later, Terwilliger determined that Warner lacked sufficient commitment to the program; he directed Warner to attend "Step meetings" and to seek another more advanced A.A. member as a "sponsor" to give him guidance and encourage his adherence to the program. The Step meetings were devoted to discussion of A.A.'s "Twelve Steps," which represented the heart of the therapy program.

The district court found that the program Warner was required to attend involved a substantial religious component. For example, the "Twelve Steps" included instruction that participants should "believe that a Power greater than ourselves could restore us"; "[make] a decision to turn our will and our lives over to the care of God as we [understand] Him "; "[a]dmit[ ] to God ... the exact nature of our wrongs"; be "entirely ready to have God remove all these defects ... [and] ask Him to remove our shortcomings"; and "[seek] through prayer and meditation to improve our conscious contact with God, as we [understand] Him." (Emphasis in original.)

Group prayer was a common occurrence at the meetings Warner attended. They frequently began with a religious invocation, and always ended with a Christian prayer. The district court found that the program "placed a heavy emphasis on spirituality and prayer, in both conception and in practice."

In July of 1992, Warner filed a motion in the Town of Woodbury Justice Court challenging the constitutionality of his consignment to A.A. The OCDP--after meeting with representatives from the local district attorney's office-- responded by offering Warner therapy in another program. The municipal court judge then dismissed Warner's motion as moot. Warner subsequently brought this action in federal district court, seeking damages, as well as a declaratory judgment that OCDP had violated his First Amendment rights. After a bench trial, the district court found that compelling Warner to attend the program violated the Establishment Clause, and further determined that the OCDP was liable for the constitutional injury, notwithstanding that it was the sentencing judge--not the Probation Department--who had imposed the condition of A.A. participation. The court, however, found that Warner's claims of financially compensable injury were not convincing, and thus awarded nominal damages in the amount of one dollar, plus attorney's fees.

Discussion

OCDP asserts that the trial court committed a variety of errors. First, it claims that it cannot be liable because, under New York law, the determination of probation conditions is solely the responsibility of the sentencing judge. Second, the OCDP argues that if it is responsible for Warner's probation terms, it is protected from any damages judgment by a quasi-judicial absolute immunity. Finally, it contests the district court's conclusion that requiring Warner to attend A.A. violated the Establishment Clause. We disagree with these contentions.

I. OCDP's Responsibility for the Sentence

To establish OCDP's liability for his sentence under 42 U.S.C. § 1983, Warner must first demonstrate that his injury resulted from a custom or policy of Orange County, as opposed

to an isolated instance of conduct. Monell v. Department of Social Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-67, 90 S.Ct. 1598, 1611-13, 26 L.Ed.2d 142 (1970) (describing congressional intent in creating liability for custom or practice). The OCDP's recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy. This was one of six standard special conditions, set forth on a form captioned "Additional Conditions of Probation Pertaining to Alcohol," which OCDP routinely submitted to sentencing judges in alcohol cases.

OCDP argues that it is nonetheless not legally responsible because it was the judge's sentencing decision, not the Probation Department's recommendation, that caused the harm. The County is certainly correct that in cases brought under § 1983 a superseding cause, as traditionally understood in common law tort doctrine, will relieve a defendant of liability. Jeffries v. Harleston, 52 F.3d 9, 14 (2d Cir.), cert. denied, 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 114 (1995); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir.1989); Wagenmann v. Adams, 829 F.2d 196, 212 (1st Cir.1987). "[T]he Supreme Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under section 1983." Buenrostro v. Collazo, 973 F.2d 39, 45 (1st Cir.1992); see Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 1098 n. 7, 89 L.Ed.2d 271 (1986); Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961).

However, tort defendants, including those sued under § 1983, are " 'responsible for the natural consequences of [their] actions.' " Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484). As the First Circuit has explained, an actor may be held liable for "those consequences attributable to reasonably foreseeable intervening

forces, including the acts of third parties." Gutierrez-Rodriguez, 882 F.2d at 561 (citations omitted).[1]

A complex chain of events led to Warner's participation in religious exercises at the A.A. meetings. Two candidates present themselves as possible superseding causes of his injury that might relieve OCDP of liability: First, as the County argues, the judge's sentencing determination; second, the actions of the A.A. chapter that Warner attended.

A. Act of the Sentencing Judge

As the OCDP correctly points out, under New York law the determination of probation terms is a judicial task, which may not be delegated to probation officers. People ex. rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965); see also People v. Fuller, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 256, 441 N.E.2d 563, 566 (1982) (sentencing court must independently decide how much of probation department report to adopt). The probation department therefore argues that its role

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[1] The First Circuit went on to state: A negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have "directly" caused the harm. An "unforeseen and abnormal" intervention, on the other hand, "breaks the chain of causality," thus shielding the defendant from liability. See also Stagl v. Delta Airlines, Inc., 52 F.3d 463, 473-74 (2d Cir.1995)(under New York law liability turns upon whether the intervening act is "a normal and foreseeable consequence of the situation created by the defendant's negligence")(quoting Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980)); Bonsignore v. City of New York, 683 F.2d 635, 638 (2d Cir.1982)(same); White v. Roper, 901 F.2d 1501, 1506 (9th Cir.1990); Marsh v. Barry, 824 F.2d 1139, 1143 (D.C.Cir.1987)(question in § 1983 case where intervening cause is alleged is "whether the resulting harm was reasonably foreseeable"); Springer v. Seaman, 821 F.2d 871, 876-77 (1st Cir.1987); Restatement (Second) Torts §§ 442A, 442B, 443, 447 (1965).

was purely advisory, and cannot have been the proximate cause of Warner's injury.

The Supreme Court, however, in Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), rejected a similar argument. Malley was a civil rights action under § 1983 against a state trooper who had procured a warrant for the plaintiff's arrest by submitting an affidavit. Plaintiff claimed the affidavit was legally insufficient. The district court had dismissed the case, believing the police officer to be absolutely immune when swearing out a warrant. The Court of Appeals reversed, resuscitating the action. The officer argued in the Supreme Court not only that he was immune, but also that he was shielded from responsibility by his entitlement to rely on the judgment of the judicial officer in finding probable cause and issuing the warrant. The Supreme Court ruled that such reliance was not justified if "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Id. at 345, 106 S.Ct. at 1098. If such was the case, the officer's application for a warrant was not objectively reasonable, because it risked an unnecessary danger of unlawful arrest. "It is true," the Court observed,

> that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this damage by exercising reasonable professional judgment.

Id. Commenting on the claim that the judge's decision to issue the warrant broke the "causal chain" between the application and the wrongful arrest, the Court noted that such an argument was "inconsistent with our interpretation of § 1983," which makes

defendants " 'responsible for the natural consequences of [their] actions.' " Id. at 344 n. 7, 106 S.Ct. at 1098 n. 7 (quoting Monroe, 365 U.S. at 187, 81 S.Ct. at 484); see also Gutierrez-Rodriguez, 882 F.2d at 561 (defendants in § 1983 cases liable for consequences caused by "reasonably foreseeable intervening forces").

The circumstances in Malley were more favorable than those here to the argument of exoneration by reason of the intervening decision of the judge. That is because a police officer applying for an arrest warrant appears in a partisan role. The magistrate to whom the application is addressed is automatically on notice that the application comes from an interested party and therefore knows that scrutiny is warranted. The probation officer, on the other hand, is not a partisan advocate aligned with either the prosecution or the defendant. He is a neutral adviser to the court.[2] Schiff v. Dorsey, 877 F.Supp. 73, 77 & n. 1 (D.Conn.1994) (describing analogous role of federal probation officer; "the sentencing judge's need for complete and accurate information about an offender requires that he enjoy a relationship of the utmost trust and confidentiality with the federal probation officer"); see also Sharon Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 105 Yale L.J. 933, 945 (1995) (describing historical role of probation officer as "neutral information gatherer with loyalties to no one but the court"). The district court noted a

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[2] New York law prohibits a court from sentencing a defendant to a term of probation not agreed upon by the parties without first considering the probation department's pre-sentence report ("PSR"). N.Y.Crim. Proc. § 390.20 (McKinney 1994). PSR's include not only material the department thinks appropriate, but also any other information the court may direct the investigation to include. Id. at § 390.30(3)(a). Once written, PSR's become confidential court documents. Id. at § 390.50(1). Although not formally located within the judicial branch, Bowne v. County of Nassau, 37 N.Y.2d 75, 371 N.Y.S.2d 449, 452, 332 N.E.2d 323, 325 (1975), New York statutes intimately tie the probation department to the sentencing process.

high likelihood of court adoption of such recommendations by the probation department.

Given the neutral advisory role of the probation officer toward the court, it is an entirely "natural consequence[ ]," Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7, for a judge to adopt the OCDP's recommendations as to a therapy provider without careful scrutiny. Such action by a judge is neither "abnormal" nor "unforeseen." Gutierrez-Rodriguez, 882 F.2d at 561.

Court adoption of the probation officer's recommendation is particularly likely when the recommendation deals with a provider of therapy. Judges are unlikely to possess particularized information about the relative characteristics and merits of different providers of therapy. For this type of information, courts generally rely heavily on probation department recommendations.[3]

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[3] The dissent suggests that we malign New York's judiciary by finding that the sentencing judge merely "rubber stamped" the probation office recommendation. We neither find nor imply any such thing. First, to say, as we do, that it was reasonably foreseeable that the sentencing judge would accept probation's recommendation on this point does not imply that the judge did not make his own determination. Second, our discussion relates only to the selection of a therapy provider and not at all to the court's determination of appropriateness of probation and of alcohol therapy. The selection of a provider of therapy is not an issue of law, and courts are ill equipped to perform this task without relying heavily on recommendations. For sentences involving alcohol abuse therapy, furthermore, the probation department's role is particularly significant. New York law allows a judge to sentence a defendant to a term of probation conditioned on "participat[ion] in an alcohol ... abuse program ... approved by the court after consultation with the local probation department having jurisdiction, or such other public or private agency as the court determines to be appropriate." N.Y. Penal § 65.10(2)(e)(emphasis added). The statutory requirement that the judge seek advice in approving a particular alcohol abuse program suggests judicial reliance on the department's expertise in selecting a program.

Whether it was reasonably foreseeable that the sentencing judge would adopt the OCDP's recommendation that Warner attend A.A. is a question of fact. See Springer, 821 F.2d at 876; Restatement (Second) of Torts § 453 cmt. b (1965). The district judge found a high likelihood that a judge would follow such a recommendation of the probation department. We review this determination for clear error, and find none. Fed.R.Civ.P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105 S.Ct. 1504, 1510- 11, 84 L.Ed.2d 518 (1985).

Finally, the dissent argues that, because Warner--following the advice of his attorney--sampled A.A. sessions prior to sentence and made no objection to their religious content at the time of sentence, the probation department's recommendation was not a proximate cause of the injury. The dissent argues also that Warner's conduct constituted consent. We are not persuaded by either argument.

The issue of proximate cause is not resolved by the mere fact that Warner's failure to object was an intervening event, subsequent to the probation recommendation and prior to the sentence. The issue, as noted above, is whether, when probation made its recommendation, it was reasonably foreseeable that the recommendation would result in the harm. Warner's failure to object was entirely foreseeable. Assuming his early visits made him aware of the full extent of the religious content of the A.A. therapy, it was not clear that Warner was aware at the time that the religious content gave him any legal basis to object, or that he had even told his lawyer about the religious content.

Furthermore, even if aware of his rights, he might well have been afraid to annoy the sentencing judge by objecting to the standard recommendation of the probation department. In short, for several reasons, it was entirely foreseeable at the time probation made its recommendation that Warner might not object.

For the same reasons and others, Warner's conduct did not constitute consent. Had Warner either suggested A.A. as a condition of probation, or somehow communicated his agreement to such a condition, we might well agree with Judge Winter. But the mere fact of his presentence attendance, designed to demonstrate his commitment to rehabilitation, did not amount to a consent to the aspect of the sentence that essentially required him to attend religious exercises. A defendant facing sentence may well undertake daily attendance at mass in the hope of convincing the sentencing judge of his penitence. We do not see how such conduct, without more, could be construed as consent to a sentence of probation conditioned on daily attendance at mass. The defendant's voluntary attendance may suggest that the illegal sentence caused him no great harm and may explain, in part, the setting of damages at $1, but it does not show consent.

B. Acts of Alcoholics Anonymous

The immediate cause of Warner's injury was not the sentencing judge's decision to send him to an alcohol rehabilitation program, but rather the actions of those who conducted the A.A. meetings Warner attended. Whether the religion-infused meetings should be regarded as a break in the causal chain between OCDP's action and plaintiff's injury, thus shielding the probation department from liability, depends, again, upon whether those actions were reasonably foreseeable to OCDP at the time it made the recommendation. Gutierrez- Rodriguez, 882 F.2d at 561; see also Malley, 475 U.S. at 344 n. 7, 106 S.Ct. at 1098 n. 7.

On this point, the district court made no findings. The probation department was, of course, obligated to use reasonable care to inform itself of the suitability of therapy programs it recommended to the court, especially where such recommendations were repeatedly made as a matter of policy. Furthermore,

the parties stipulated prior to trial that OCDP, when it formulated its policy of recommending A.A., was aware of the program's Twelve Steps and of their deeply religious character. Accordingly, there can be no question as to the reasonable foreseeability of the religious nature of the program OCDP was recommending for Warner; OCDP was well aware of it. The actions of A.A. cannot be considered to have broken the chain of causation. OCDP is responsible for any resulting injury to Warner's First Amendment rights.

II. Orange County's Other Defenses

A. Immunities

OCDP contends that even if its recommendation to the judge was a proximate cause of Warner's sentence, it is immune from liability. It claims that probation department sentence recommendations are so integral a part of the judicial process as to benefit from an absolute quasi-judicial immunity similar to that enjoyed by prosecutors. Cf. Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985)(noting "exten[sion of] absolute [judicial] immunity to certain others who perform functions closely associated with the judicial process"); Imbler v. Pachtman, 424 U.S. 409, 420, 431, 96 S.Ct. 984, 990, 995-96, 47 L.Ed.2d 128 (1976) (prosecutor's actions taken pursuant to prosecutorial function benefit from absolute quasi-judicial immunity).

Were this suit brought against the probation officer, Terwilliger, the claim for absolute immunity would likely have merit. We have held that actions of federal probation officers in preparing and furnishing presentence reports to courts are protected by an absolute immunity from suit for damages. Dorman v. Higgins, 821 F.2d 133, 137 (2d Cir.1987). In so holding, we noted that this determination was consonant "with the similar conclusions of other circuits with respect to state

probation officers operating within similar frameworks." Id. at 138 (citing Demoran v. Witt, 781 F.2d 155, 157-58 (9th Cir.1985); Hughes v. Chesser, 731 F.2d 1489, 1490 (11th Cir.1984)). A district court of this circuit, recognizing the close similarities between the roles of New York state and federal probation officers in preparing presentence reports, has held that New York state probation officers benefit from a similar absolute immunity. Shelton v. McCarthy, 699 F.Supp. 412, 414-15 (W.D.N.Y.1988).

This case, however, does not require us to determine whether New York state probation officers benefit from immunity covering their submission of presentence reports, for Warner did not name any probation officers as defendants. The suit is brought only against the Orange County Department of Probation. The question is thus whether the claimed immunity extends to the governmental entity. We find that it does not.

Although the Supreme Court has not yet ruled on the applicability of absolute quasi-judicial immunities to municipal government entities, it has repeatedly suggested that such protections are not available. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), Justice Rehnquist explained on behalf of a unanimous Court that past "decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983." Id. at 166, 113 S.Ct. at 1162.[4]

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[4]Justice Rehnquist referred in particular to the Court's decision in Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), overruling Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and holding that local governments were no longer absolutely immune from suit under § 1983. Monell expressly reserved the question of whether municipalities might be entitled to some more limited form of immunity. 436 U.S. at 701, 98 S.Ct. at 2041. In Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63

Similarly, in Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985), the Court indicated that the absolute prosecutorial immunity doctrine set forth in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), did not extend to claims brought against government entities under § 1983. "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment." Id. at 167, 105 S.Ct. at 3106. These rulings follow directly from the Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), which held that municipalities do not benefit from the qualified immunity of their officers.

Following the direction of these cases, we refused in Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir.1995), to extend the absolute prosecutorial immunity of the Suffolk County district attorney to the County itself. Id. at 1153 (citing Leatherman).[5] The Pinaud ruling guides our decision here, for in origin the quasi-judicial immunities of probation officers and prosecutors are closely linked. Indeed, our holding in Dorman v. Higgins that federal probation officers are protected by an absolute

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L.Ed.2d 673 (1980), the Supreme Court rejected the notion that the qualified immunity of municipal officials extends to municipalities themselves.

[5] See also Baez v. Hennessy, 853 F.2d 73, 75-76 (2d Cir.1988)(noting Supreme Court's agreement in dictum with view that absolute prosecutorial immunity does not extend to County government)(citing Kentucky v. Graham), cert. denied, 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989). A few district courts had taken a different course, but these opinions were overruled by Pinaud. See Whelehan v. County of Monroe, 558 F.Supp. 1093, 1108 (W.D.N.Y.1983); Armstead v. Town of Harrison, 579 F.Supp. 777, 782-83 (S.D.N.Y.1984).

immunity in the preparation of presentence reports was grounded in significant part on the similarities between the prosecutorial function and the task of the probation officer, as well as probation officers' close relationship to the judicial process.[6] Dorman, 821 F.2d at 136-37. As we have found in Pinaud that the absolute quasi-judicial immunity of prosecutors does not extend to the municipalities that employ them, the answer to the closely parallel question whether any immunity possessed by municipal probation officers would similarly benefit the municipality follows directly. We conclude on the basis of the authorities cited above that no such protection inures in Orange County by virtue of any immunity that may be possessed by its probation officers.

We are fortified in this view by our own opinions and those of other circuits, which have in a variety of contexts refused to extend immunities-- either absolute or qualified--to municipalities. As Judge Posner has explained:

> [T]he municipality's liability for [its officials'] acts extends to acts for which the policy-making officials themselves might enjoy absolute immunity because the acts were legislative or judicial in character. Owen ... so held with regard to the qualified immunity of municipal officers for their executive acts, and we cannot see why there should be a different result

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[6] We noted, paraphrasing the Supreme Court's language in Imbler setting forth the limits of prosecutorial immunity, that "a federal probation officer acts as an arm of the court and that ... task is an integral part of one of the most critical phases of the judicial process." Dorman, 821 F.2d at 137. And we made clear that federal probation officers deserve absolute immunity because they fall into a class of persons, such as prosecuting attorneys and witnesses testifying in judicial proceedings, whose activities require them to "perform functions [so] closely associated with the judicial process" that they "have also been accorded [absolute judicial] immunity." Id. (citation omitted).

here just because these officers' immunity is absolute rather than qualified.

Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir.1983). Also, in Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir.1992), we held that a municipality is liable for the unconstitutional acts of its legis ature even though the legislators themselves are protected by absolute immunity. Id. at 74. We stated in that case that "there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983." Id.; see also Ferran v. Town of Nassau, 11 F.3d 21, 23 (2d Cir.1993) ("[T]he town and county have no § 1983 immunity."), cert. denied, 513 U.S. 1014, 115 S.Ct. 572, 130 L.Ed.2d 489 (1994); Reed, 704 F.2d at 953 (municipality has no absolute legislative or judicial immunity). Indeed, the circuit courts that have addressed the question are unanimous that the absolute immunity of local legislators does not extend to the municipalities they serve. See Berkley v. Common Council of Charleston, 63 F.3d 295, 296 (4th Cir.1995)(en banc), cert. denied, 516 U.S. 1073, 116 S.Ct. 775, 133 L.Ed.2d 727 (1996).

We are similarly not alone in the view that quasi-judicial absolute prosecutorial immunity does not extend to municipalities. The Ninth Circuit made a similar ruling in Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681 (9th Cir.1984) ("[Local governments] enjoy no immunity under § 1983 for damages."). At least one circuit has even gone so far as to hold that the absolute judicial immunity of courts themselves does not extend to local governments where a municipal official acts in a judicial capacity. Reed, 704 F.2d at 953; Soderbeck v. Burnett County, 752 F.2d 285, 293 (7th Cir.), cert. denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 261 (1985); see also Haynesworth v. Miller, 820 F.2d 1245, 1272 n. 227 (D.C.Cir.1987)(noting that "municipality may ... face § 1983 liability for the conduct of officials who enjoy absolute personal

immunity" including liability for "conduct of a judge").[7] In any

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[7] We do not imply that we would rule similarly where the asserted liability of the municipality derives from the conduct of a judge. A number of questions arise that may distinguish such a case. It is difficult to say that a municipal judge has "final authority to establish municipal policy" under state law at all, Walker v. City of New York, 974 F.2d 293, 296 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993); City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (plurality opinion), as such rulings are almost always--as here--appealable to higher courts within the state system. See Eggar v. City of Livingston, 40 F.3d 312, 314- 15 & n. 3 (9th Cir.1994), cert. denied, 515 U.S. 1136, 115 S.Ct. 2566, 132 L.Ed.2d 818 (1995); N.Y. Uniform Justice Court Act §§ 1701, 1702 (McKinney 1989). "Local" judicial decisions are therefore neither final, nor exclusively local. Eggar, 40 F.3d at 314-15 & n. 3.

Moreover, when a municipal judge enforces state law he does not act as a municipal official or lawmaker, but rather serves only to effectuate state policies. See Eggar, 40 F.3d at 314-15; Johnson v. Moore, 958 F.2d 92, 94 (5th Cir.1992); Bigford v. Taylor, 834 F.2d 1213, 1222 (5th Cir.)(judge's " 'deliberate or mistaken departure from the controlling [state] law' cannot be said to represent county policy")(quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 486, 106 S.Ct. 1292, 1302, 89 L.Ed.2d 452 (1986)), cert. denied, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 108 (1988); Carbalan v. Vaughn, 760 F.2d 662, 665 (5th Cir.), cert. denied, 474 U.S. 1007, 106 S.Ct. 529, 88 L.Ed.2d 461 (1985); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir.1980).

Courts have also denied municipal liability where--as is frequently the case--state law makes judges who are casually referred to as "county" officials in fact officers of state government, and a part of the state judicial system. See Eggar, 40 F.3d at 314 & n. 3 (power of city judges under Montana law derives from state statutes, and the judges are in the hierarchy of the state judicial system); Woods v. Michigan City, 940 F.2d 275, 279 (7th Cir.1991)(under Indiana law county courts are a branch of the "state's constitutional system"); Thompson v. County of Rock, 648 F.Supp. 861, 866-67 (W.D.Wis.1986)(denying municipal liability for acts of Wisconsin county court commissioners on grounds that they are in fact state officials). Since New York municipal courts are "part of the unified court system for the state," N.Y. Uniform Justice Court Act § 102 (McKinney 1989), this logic might well apply in New York as well.

Finally, we note that even in the event that the law were to allow a municipality to be liable for judicial actions, judges themselves may be protected against providing testimony as to their thought processes in issuing an opinion. A number of courts have so held in the context of

event, we hold that even if OCDP's probation officers are absolutely immune from liability, that protection does not extend to the County itself.

B. Establishment Clause

The County also argues that forcing Warner to attend Alcoholics Anonymous did not violate the First Amendment's Establishment Clause. We disagree. The Supreme Court has repeatedly made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " Lee v. Weisman, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984)); see County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989); Everson v. Board of Educ., 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947); see also Katcoff v. Marsh, 755 F.2d 223, 231-32 (2d Cir.1985) (observing that army chaplaincy program "meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to

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federal habeas corpus review of state court decisions. See Weidner v. Thieret, 866 F.2d 958, 963 (7th Cir.1989)(recommending that state trial judges offer testimony in federal habeas cases, if at all, by voluntary affidavit since "it would be unseemly for a federal district judge to summon the state trial judge as a witness ... to give testimony and be cross-examined"); Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. Unit B 1982)(prohibiting testimony of state trial judges in federal habeas cases on rationale underlying their initial decision, inter alia, for reasons of federalism and comity), rev'd on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A similar logic would apply in collateral review of municipal court decisionmaking under § 1983.

worship or not as he chooses without fear of any discipline or stigma").

The A.A. program to which Warner was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer. The trial judge reasonably found that it "placed a heavy emphasis on spirituality and prayer, in both conception and in practice." We have no doubt that the meetings Warner attended were intensely religious events.[8]

There can be no doubt, furthermore, that Warner was coerced into participating in these religious exercises by virtue of his probation sentence. Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs. The probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content. Once sentenced, Warner had little choice but to attend the A.A. sessions. If Warner had failed to attend A.A., he would have been subject to imprisonment for violation of probation. See N.Y.Penal Law §§ 60.01(4), 65.00(2) (McKinney 1987); N.Y.Veh. & Traf.Law §§ 511(2), 1192(1) (McKinney 1986 & Supp.1996).

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[8] As noted above, the district court made no finding on OCDP's awareness of the religious nature of the A.A. program. We nonetheless found OCDP's responsibility by reason of the stipulation of the parties that OCDP knew the religious nature of A.A.'s Twelve Steps. The district judge's finding of a violation of the Establishment Clause was based in part on several factors, recited above, that were not included in the Stipulation covering OCDP's knowledge--particularly the prayers. Although there was no finding that OCDP knew (or should have known) of the prayers, the finding of Establishment Clause violation and of OCDP's responsibility are adequately supported by the stipulated facts.

Had Warner been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different. Our ruling depends, as in Lee, on the "fundamental limitation[ ] imposed by the Establishment Clause" that bars government from "coerc[ing] anyone to support or participate in religion or its exercise." 505 U.S. at 587, 112 S.Ct. at 2655. In circumstances similar to our case, the New York Court of Appeals recently reached the same conclusion. Griffin v. Coughlin, No. 73, 1996 WL 317180, 88 N.Y.2d 674, --- N.Y.S.2d ----, --- N.E.2d ---- (June 11, 1996). In Griffin, the New York court held that a prisoner's family visiting privileges may not be conditioned on participation in a treatment program that adopts the "religious-oriented practices and precepts of Alcoholics Anonymous." Id. at *1, --- N.Y.S.2d at ----, --- N.E.2d at ----. The court emphasized that it was not proscribing A.A. programs offered to prisoners on a voluntary basis. Id. at *11, --- N.Y.S.2d at ----, --- N.E.2d at ----. It was the coercive circumstances, conditioning a desirable privilege on the prisoner's participation in a religious program, without alternative, that drove the New York court to find a violation of the Establishment Clause.[9]

Orange County argues that even if Warner was forced to attend the meetings, he was not required to participate in the religious exercises that took place. The County argues that, as a mature adult, Warner was less susceptible to such pressure than the children who were required to stand in respectful silence during a school prayer in Lee v. Weisman, 505 U.S. at 591-95, 112 S.Ct. at 2658-59; it points out that the Supreme Court expressly questioned whether the obligation imposed by the

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[9] See also O'Connor v. California, 855 F.Supp. 303 (C.D.Cal.1994)(no Establishment Clause violation where probationers were offered a choice between A.A. and a secular program).

school in Lee might have been constitutionally tolerable "if the affected citizens [had been] mature adults." Id. at 593, 112 S.Ct. at 2658.

We do not find Orange County's argument convincing. Although it is true Warner was more mature, his exposure was more coercive than the school prayer in Lee. The plaintiff in Lee was subjected only to a brief two minutes of prayer on a single occasion. Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal--"Thirteen Stepping" in A.A. parlance--the probation officer required that he attend "Step meetings" to intensify his motivation. Warner was also paired with another member of A.A. as a method of enhancing his indoctrination into the group's approach to recovery from alcoholism. Most importantly, failure to cooperate could lead to incarceration. Although the trial judge found that Warner's success in remaining aloof diminished his damages to a token of one dollar, the fact that Warner managed to avoid indoctrination despite the pressure he faced does not make the County's program any less coercive, nor nullify the County's liability.

The County argues further that the non-sectarian nature of the A.A. experience immunizes its use of religious symbolism and practices from Establishment Clause scrutiny. The argument is at the very least factually misleading, for the evidence showed that every meeting included at least one explicitly Christian prayer. Furthermore, the claim that non-sectarian religious exercise falls outside the First Amendment's scrutiny has been repeatedly rejected by the Supreme Court. As the Court made clear in Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), "a principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion." Id.

at ----, 114 S.Ct. at 2491; see also Allegheny, 492 U.S. at 591, 109 S.Ct. at 3100; School Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-17, 83 S.Ct. 1560, 1568-69, 10 L.Ed.2d 844 (1963).[10]

Similarly, the County's reliance on Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), is unavailing. In Marsh, the Supreme Court held that the Nebraska state legislature did not violate the Establishment Clause by commencing its sessions with a sectarian prayer. That opinion relied heavily on the long tradition of public prayer in this context. Id. at 786-90, 795, 103 S.Ct. at 3333-35, 3338 (noting "unbroken practice for two centuries in the National Congress"). The Court in Lee noted the significant differences between the opening ceremony of a state legislative session where adults are free to "enter and leave with little comment and for any number of reasons" and the powerful emotional compulsion for a child to be present at her high school graduation. Lee, 505 U.S. at 595-97, 112 S.Ct. at 2660. The differences between the invocation at a session of the state legislature and Warner's

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[10] Orange County relies upon Stafford v. Harrison, 766 F.Supp. 1014 (D.Kan.1991), for the proposition that A.A. participation is not a religious exercise. Stafford involved a mandatory prison-based substance abuse program, structured around the principles of A.A. The court upheld the program, arguing that A.A.'s notions of a "higher power" and "God" were sufficiently flexible and non-denominational that the program could not be said to constitute a "religion." This is a misapplication of First Amendment doctrine, which prohibits coerced participation in religious exercise of any variety for its favoritism of religion over non- religion. We decline to follow that case, which has been criticized for misreading relevant Supreme Court precedent. See Scarpino v. Grosshiem, 852 F.Supp. 798, 804 n. 5 (S.D.Iowa 1994); Warner v. Orange County Dep't of Probation, 827 F.Supp. 261, 267 (S.D.N.Y.1993).

compulsory adherence to the A.A. program are even more obvious.[11]

Resolving questions as to the reach of the Establishment Clause "of necessity [requires] line-drawing, ... determining at what point a dissenter's rights of religious freedom are infringed by the State." Id. at 598, 112 S.Ct. at 2661. We have little difficulty concluding that the constitutional line was crossed here.

Conclusion

We have considered Orange County's other claims, and find them to be without merit. The judgment of the district court is affirmed.

WINTER, Circuit Judge, dissenting:

I respectfully dissent.

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[11] The parties also offer analyses of this case within the much- maligned but still viable framework of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Compare Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n. 7, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993)(noting ongoing viability of Lemon) with Lee, 505 U.S. at 643-45, 112 S.Ct. at 2685 (Scalia, J., dissenting) (noting criticism of Lemon) and Lamb's Chapel, 508 U.S. at 397-400, 113 S.Ct. at 2149-50 (Scalia, J., concurring)(same). Whatever other tests may be applicable in the Establishment Clause context, the Supreme Court has made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." Lee, 505 U.S. at 587, 112 S.Ct. at 2655. Because sending Warner to A.A. as a condition of his probation, without offering a choice of other providers, plainly constituted coerced participation in a religious exercise, we find a violation of the Establishment Clause.

The pertinent facts concerning Warner's plea and sentencing are not in dispute. He was arrested and pled guilty to his third alcohol-related driving offense in a year. Prior to meeting with the probation officer who would recommend a sentence, Warner voluntarily began to attend Alcoholics Anonymous meetings. This was on the advice of his lawyer, who, according to Warner's testimony, believed "that the court would look upon me more favorably in the sentencing procedure if I can show that I was pursuing a program of rehabilitation." The probation officer subsequently recommended to the sentencing court that Warner continue his ongoing attendance at A.A. meetings as a special condition of probation. The sentencing judge, who is obliged by state law to make an independent sentencing decision, imposed that condition. Warner registered no objection at the sentencing hearing and took no appeal. Later, he moved the sentencing court to relieve him of any obligation to attend meetings with a religious component and was quickly accommodated with a non-religious counseling program. Based on these facts, my colleagues hold that the county probation authority may be sued for damages under Section 1983 for violating the Establishment Clause.

My dissent is based on two of the available grounds. First, Warner waived his claim or, applying tort law, consented to the probation officer's alleged intentional tort of recommending to the court attendance at A.A. meetings as a condition of probation. Indeed, Warner voluntarily began attendance at A.A. meetings before any involvement by the probation office in order to convince the sentencing judge that his voluntary selection of this particular rehabilitative program obviated the need for a stiffer sentence. Moreover, the judge exercised his exclusive authority to determine what sentence should be imposed. The imposition of the sentence by the court was, therefore, an independent cause that superseded the recommendation of the probation officer in causing the injuries. Second, the invocation of the Establishment Clause, rather than the Free Exercise

Clause, puts into play a principle that portends changes in our penal system that are not required, in my view, by the Constitution.

I

I turn first to the consent and causation issues.

This lawsuit is an instance of remarkable gall. Warner voluntarily selected and began attendance at A.A. meetings on the advice of counsel in order to impress the sentencing court with his determination to overcome his alcoholism. Now he complains that a subsequent recommendation of a probation officer that he attend such meetings entitles him to monetary damages.

Although we do not have the minutes of the sentencing hearing, Warner's testimony in the district court stated that his ostensible desire to attend A.A. meetings was to be used as a plus in his favor in persuading the sentencing court to be lenient. The judge thus imposed a condition of probation embraced by Warner on his own initiative. Warner never indicated to the sentencing court his view that a condition of probation requiring attendance at A.A. meetings rendered the proposed sentence unconstitutional. Nor did Warner appeal from the sentence imposed.

By any measure known to me, Warner's conduct was a waiver, the purposefully planned abandonment of a known right or, in common law tort doctrine, consent to an intentional tort, a full defense under New York law. See Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (4th Dep't 1947); see also Prosser and Keeton on the Law of Torts § 18. I would hold, therefore, that his claim for damages is barred.

Even if the principles relating to injuries caused by negligence relied upon by my colleagues are applied, Warner's claim fails. Warner's initiative in voluntarily selecting and attending A.A. meetings and his failure to bring his present claim to the court's attention were the cause of whatever constitutional harm he suffered from the recommendation of the probation officer. [12] As his successful petition for state collateral review under N.Y.Crim. Proc. L. § 440.20(1) and the recent decision in the New York Court of Appeals in Griffin v. Coughlin, 1996 WL 317180, 88 N.Y.2d 674, --- N.Y.S.2d ----, --- N.E.2d ---- (June 11, 1996), demonstrate, relief was his for the asking.

I also cannot agree with the "finding" that the sentencing judge did not make the independent judgment required of him by state law, see People ex rel. Perry v. Cassidy, 23 A.D.2d 706, 257 N.Y.S.2d 228, 229 (1965), and that that judgment was not, in the jargon of negligence law, a superseding cause of Warner's injuries. In my view and that of others, see People ex rel. Brown v. La Vallee, 13 A.D.2d 556, 211 N.Y.S.2d 728, 729 (1961); Honeycutt v. Ward, 612 F.2d 36, 41 (2d Cir.1979), cert. denied, 446 U.S. 985, 100 S.Ct. 2969, 64 L.Ed.2d 843 (1980), a heavy presumption of correctness attends proceedings such as the one before us where no error was brought to the attention of the sentencing judge. [13] My colleagues, and the district judge, indulge

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[12] I do not mean to suggest that, if the constitutional challenge were unsuccessfully brought to the court's attention, Warner's suit against the probation authority would have merit. Rather, an appeal--to the United States Supreme Court if necessary--would have been in order.

[13] I need not reach the issue given the facts of this case, but there is a strong argument to be made that, where the sentencing judge cannot under state law delegate the power to determine a sentence to probation officers--as in New York--an illegal delegation is itself a superseding cause and a defendant's remedy is an appeal rather than a Section 1983 action.

in the contrary presumption, namely, that acceptance of the sentencing recommendation of a probation officer as to sources of treatment is merely "rubberstamping." They do this notwithstanding testimony that New York judges frequently reject special conditions of probation recommended by probation authorities.[14] They also ignore the possibility that recommendations of probation officers may be tailored to the known views of judges, creating a false appearance of rubberstamping.[15]

Moreover, as noted, the record is not silent as to whether the particular sentencing judge would have imposed the requirement of attendance at A.A. meetings had Warner indicated his concerns about the religious aspects of A.A. In fact, it fairly shouts that the judge would have rejected the condition. After sentencing, Warner complained to the probation officer about the religious aspects of A.A. At this point, of course, the officer lacked power to alter the sentence.[16] Warner then, for the first

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[14] My colleagues rely upon N.Y. Penal Law § 65.10(2)(e) regarding the requirement that a court consult with the local probation authority regarding selection of an alcohol abuse program. Because this provision requires that the consultation be with the probation authority "or ... other public or private agency," it does not give any special status to probation authorities over other sources of information.

[15] I believe this presumption to be rather unfair to state court judges. They lack any practical method of responding to the conclusion that they abdicated responsibility, at least short of asking to testify in the federal proceeding that "I was indeed following the law, just as the record indicates."

[16] One of Warner's original theories was that the sentence vested discretion in the probation officer to vitiate the requirement of A.A. attendance and that the probation officer's exercise of discretion in requiring continued attendance, rather than the original recommendation, was the basis of liability. The district court and my colleagues focus instead on the recommendation. Because I read the sentence to vest discretion to excuse

time, challenged the sentence by filing a petition under N.Y.Crim. Proc. L. § 440.20(1) (McKinney 1995) to set aside the pertinent part of his sentence on the ground that it was invalid. The court ruled that Warner could comply with the conditions of probation by going to a non-religious alcohol counseling program and denied the petition as moot. Indeed, Warner's complaint alleged that "[a]s a result of the Town of Woodbury Justice Court's Decision and Order, plaintiff is currently no longer required by his probation officer to participate in Alcoholics Anonymous but is, instead, required to attend an alternative program." In short, Warner's own papers indicate that as soon as the judge was alerted to Warner's distaste for the religious aspects of A.A., the judge immediately altered that condition of probation. That being the case, the record support for the finding that the judge merely rubberstamped the recommendation of the probation officer is not apparent to me.

Furthermore, another finding, not made by my colleagues, is necessary to establish the recommendation of the probation officer as the legal cause of Warner's injuries. To reach my colleagues' conclusion, we would also have to find that an appeal from the sentence would have been fruitless because the New York appellate courts would simply not have given any consideration whatsoever to Warner's constitutional challenge out of blind and unhesitating deference to the recommendation of the Orange County probation officer. Quite the contrary, we now know that relief was available. See Griffin.

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), works against Warner. The procuring of a search warrant is not an adversary proceeding, much less one like

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further A.A. attendance only upon a completed rehabilitation and not for other reasons, such as a probationer's distaste for the religious aspects of the program, I agree that the focus should be on the recommendation.

sentencing, in which the subject has a constitutional right to counsel and a hearing on the merits. Because the magistrate issuing a warrant is not subject to adversary argument revealing flaws in the application and affidavit, the magistrate's intervening decision does not immunize the officer's unreasonable conduct. Malley simply has no application to a proceeding that is adversary and subject to immediate appellate review.

II

I now turn[17] to the use of the Establishment Clause to invalidate a condition of probation that requires attendance at A.A. meetings. I will assume that the religious aspects of A.A. are sufficient to trigger a violation of either the Establishment or Free Exercise Clause if the other requisites of such claims are met. Nevertheless, I do not agree that the Establishment Clause provides a basis for relief to Warner.

In finding an Establishment Clause violation, my colleagues rely heavily upon the fact the probation authority did not recommend to the sentencing court that Warner have a choice between A.A. and a non-religious rehabilitation program. As a result, he was, in their view, coerced into participation in A.A. (In my view, of course, he freely chose A.A.) Although, as my colleagues point out, coerced participation in religious ceremonies may be a factor in finding an Establishment Clause violation, see Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it is not a necessary element of such a claim, and a

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[17] I do not reach the immunity issues. I do note, however, that the immunity of probation officers is generally believed to be derived from judicial immunity. See Dorman v. Higgins, 821 F.2d 133, 136-37 (2d Cir.1987). My colleagues' attempt in footnote 7 to distinguish a claim of municipal liability for the conduct of judges seems, therefore, somewhat incomplete.

choice among all available options is not a remedy for a valid Establishment Clause claim.

Relevant Establishment Clause precedent bars governmental endorsement and support of religion even in contexts in which no coercion exists. The "preservation and transmission of religious beliefs and worship is ... committed to private sphere," Lee at 589, 112 S.Ct. at 2656, and government may not support religious practices even when those engaged in them have freely chosen to do so. Government may not aid "a single religion or religion generally," School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985), but must "maintain a course of neutrality among religions, and between religion and nonreligion." Id. A law that merely facilitates citizens in the practice of their religion may, therefore, be invalid even though no non-believer is negatively affected--even as a taxpayer. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

If attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion. Following the logic of Establishment Clause jurisprudence, it would seem to me that such a condition is a violation whether or not the only person directly affected, the probationer, preferred a religiously oriented program over a secular one. The lack of governmental neutrality is precisely what caused the Supreme Court in Grumet to strike down a state law establishing a school district for the Village of Kiryas Joel, which was populated only by persons with a common religion. And, in Lee, surely the plaintiff's constitutional claim could not be satisfied by an offer of an additional ceremony at the high school graduation allowing speakers of her choice to express whatever spiritual or atheistic views--or disagreements with the spiritual or atheistic views of others--that were congenial to her.

Establishment Clause logic, if followed, therefore, would endanger any number of ubiquitous penal programs that are, in my view, clearly permissible. To take just two common examples, prisons may have chaplains, who systematically offer religious counseling, services, and other programs to prisoners. They may be selected, paid, and even monitored by state officials. Also, sentences to community service may involve service at soup kitchens, many of which are operated by churches where a meal begins with a prayer and religious tracts are distributed.

None of the programs described above violate the Establishment Clause in my view. Applying the three-part test established in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), each has a secular purpose in that they all further rehabilitation in one way or another. None have as a principal or primary effect the advancement or inhibition of religion. Any such effect is incidental. Finally, they do not lead to excessive entanglement of the government in religion. I very much doubt that substantial disagreement exists over this point. The state's control over the lives and activities of prisoners certainly justifies its making religious programs available to them. Indeed, under our caselaw, a state must offer some congregate programs of a sectarian nature. See Salahuddin v. Coughlin, 993 F.2d 306 (2d Cir.1993); Young v. Coughlin, 866 F.2d 567, 570 (2d Cir.), cert. denied, 492 U.S. 909, 109 S.Ct. 3224, 106 L.Ed.2d 573 (1989). However, I also see no difference between the penal programs described above and Warner's sentence so far as the Establishment Clause--in contrast to the Free Exercise Clause--is concerned.

To be sure, my colleagues do not hold that attendance at A.A meetings can never be a condition of probation. Indeed, they expressly state that Warner should have been given a choice, a statement I take to mean that persons facing a sentence for alcohol-related offenses may constitutionally be offered a

choice between A.A. meetings (or other religiously-based rehabilitation programs) and alternative secular programs as a condition of probation. My disagreement is simply over whether such a choice is required, or even permitted, by the Establishment Clause.

I hasten to add that I do not view compulsory activity with a substantial religious component as a valid penal measure, at least where equally effective secular rehabilitative programs are available.[18] See O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (restriction on free exercise rights must be reasonably related to valid penalogical interest). Compulsory attendance at religious ceremonies as part of a penal sentence surely raises serious issues under the Free Exercise Clause and might well require the provision of a choice between secular and sectarian programs. Warner makes no Free Exercise claim, however.

III

This is a decision with important ramifications. It transports tort doctrine of proximate cause and foreseeability drawn from the law of negligence to the judicial process. In so doing, it fails to give any recognition to the more appropriate rules governing intentional torts, to the power of a party to a court proceeding to avoid harm by raising objections and taking appeals, or to the role of the judge as an independent decision-maker. It thus may have implications for advocates as well as for those who advise judges. See Note 6, supra. It also brings to sentencing, probation, and penal institutions Establishment Clause doctrine that may not be easily cabined.

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[18] It is conceivable that in some areas the only rehabilitative program available, e.g., A.A., has some religious content.

At a practical level, my colleagues' decision exposes every probation authority in this circuit to suits for damages and attorney's fees in virtually every case in which a recommendation of attendance at A.A. meetings has been made and accepted within the statute of limitations period, if no available alternative was offered and such recommendations were commonly made. Liability will follow no matter whether the defendant ever brought the constitutional issue to the attention of the sentencing court. Other claims of unconstitutional recommendations under Section 1983 will follow notwithstanding failure to make objections to sentencing courts.

I therefore respectfully dissent.

Appendix F: 870 F.Supp. 69

Robert WARNER, Plaintiff,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION, Defendant.

No. 93 Civ. 1544 (GLG).

United States District Court,
S.D. New York.

Dec. 14, 1994.

Motorist who had been convicted of alcohol-related driving offense brought § 1983 action against county department of probation challenging constitutionality of probation condition requiring motorist to attend program for recovery from alcoholism, Alcoholics Anonymous (AA), meetings. The District Court, 827 F.Supp. 261, denied department's motion to dismiss, and following bench trial, the District Court, Goettel, J., held that: (1) motorist was entitled to bring civil rights action against department; (2) department violated establishment clause by requiring AA meeting attendance; and (3) motorist was entitled to $1 in damages.

So ordered.

Robert N. Isseks, Goshen, NY, for plaintiff.

Richard B. Golden, County Atty., County of Orange, Goshen, NY, for defendant (M. Kevin Coffey, of counsel).

OPINION

GOETTEL, District Judge:

This action was brought by plaintiff Robert Warner to obtain declaratory and compensatory relief on his claim that the Orange County, New York Department of Probation coerced him into attending Alcoholics Anonymous meetings in violation of the United States Constitution's First Amendment Establishment of Religion Clause.[1] Previously, we denied defendant's motion to dismiss. See Warner v. Orange County Dep't of Probation, 827 F.Supp. 261 (S.D.N.Y.1993). A one day bench trial was held on May 25, 1994 in White Plains, New York. The following are the Court's findings of fact and conclusions of law.

I. Findings of Fact

On November 13, 1990, plaintiff pleaded guilty to aggravated unlicensed operation of a motor vehicle in the second degree, a violation of N.Y.Vehicle and Traffic Law § 511(2), and Driving While Ability Impaired, a violation of N.Y.Vehicle Traffic Law § 1192(1). This was plaintiff's third alcohol-related driving offense within a period of slightly more than one year. Plaintiff was sentenced by Judge David L. Levinson of the Justice Court of the Town of Woodbury, Orange County, New York, to three years probation. There were six "Additional Conditions of Probation Pertaining To Alcohol." The fifth condition is the important one for this case: "That you will attend Alcoholics Anonymous at the direction of your Probation Officer."

Alcoholics Anonymous ("A.A.") is a worldwide organization that has been helping men and women recover from alcoholism since the 1930s. Our inquiry into A.A. is not concerned with the effectiveness of the program (which we have no reason to

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[1] Plaintiff does not claim that defendant's actions were a violation of the First Amendment's Free Exercise Clause.

doubt), but rather with whether the A.A. program as plaintiff experienced it was essentially religious in nature.

The plaintiff attended A.A. meetings in Monroe, New York under the direction of his probation officer, Neal Terwilliger, from November 1990 through September 1992. On January 23, 1991 plaintiff, who is an atheist, complained to Terwilliger about what he perceived as the religious nature of the A.A. meetings he had attended. Terwilliger was not inclined to excuse plaintiff on this ground--he told plaintiff to continue attending the meetings, and to focus on how A.A. could help him with his abuse of alcohol.

The centerpiece of the A.A. program, as plaintiff experienced it, was the Twelve Steps of Alcoholics Anonymous. The Twelve Steps are the essential statement of the A.A. program. The plaintiff was specifically directed by Terwilliger to attend step meetings, each of which would focus on how to "work" a particular step. The Twelve Steps are as follows:

1. We admitted we were powerless over alcohol--that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood Him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly ask Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.

9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

(emphasis in original).

The concept of a higher power is at the center of the Twelve Steps. According to the Twelve Steps, the higher power is the source of the knowledge and strength that alcoholics need to recover. In fact, the first three steps explicitly deny that recovery from alcoholism is possible without reliance on a higher power. The Twelve Steps stand for the proposition that recovery from alcoholism requires a spiritual awakening.

This emphasis on a higher power is also the central theme of the third edition of A.A.'s basic text, entitled "Alcoholics Anonymous," but commonly referred to as the "Big Book." At the A.A. meetings plaintiff attended, the Big Book was presented as an all-purpose guide for anyone having problems working the Twelve Steps. The first section, up to page 164, describes the A.A. program. The rest of the book is composed of alcoholics' personal stories.

The first chapter of the Big Book introduces the A.A. program through the life story of Bill W., a co-founder of A.A. Written in an autobiographical style, it describes the descent of Bill W. into alcoholic despair, and his recovery. The key to beginning his recovery, Bill W. writes, was "being willing to believe in a Power greater than myself." Id. at 12. Bill says: "Belief in the power

of God, plus enough willingness, honesty and humility to establish and maintain the new order of things, were the essential requirements. Simple, but not easy; a price had to be paid. It meant destruction of self- centeredness. I must turn in all things to the Father of Light who presides over us all." Id. at 13-14. Summing up, Bill writes: "Faith has to work twenty-four hours a day in and through us, or we perish." Id. at 16. The rest of the Big Book continues this theme.

Group prayer was common at the A.A. meetings plaintiff attended. Many of the meetings began with a non-denominational "Serenity Prayer" ("Lord, grant me the serenity to accept the things that I cannot change, the courage to change the things I can, and the wisdom to know the difference") and all of the meetings ended with the Lord's Prayer, which is a specifically Christian prayer. In addition, those attending the meetings were strongly encouraged to pray.

In short, the A.A. program that plaintiff experienced placed a heavy emphasis on spirituality and prayer, in both conception and in practice.

II. Conclusions of Law

Warner sues for damages and declaratory relief pursuant to 42 U.S.C. § 1983, on the ground that the Probation Department's actions violated the First Amendment's Establishment Clause. The First Amendment is made applicable to the states by the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963). Defendant does not deny that the County Department of Probation's actions in this case constitute state action for purposes of the Fourteenth Amendment.

Before deciding the substance of plaintiff's claim, we must consider defendant's argument that plaintiff has failed to state a

claim against it because the court which sentenced him, not the Probation Department, determined the conditions of his probation. This argument is unconvincing. Certainly, former probationers can sue the state over the constitutionality of conditions of probation which are set forth in a state statute. See, e.g., Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). We do not see why former probationers should not also be able to sue the government over conditions of probation which are the result of an informal policy of a local agent of the state.

Moreover, judges generally agree to whatever conditions are recommended by the Probation Department, as long as they are reasonable. In this case, the idea of requiring plaintiff to attend A.A. as a condition of probation originated with the Probation Department, not with the judge. Additionally, it was plaintiff's probation officer, not the judge, who rebuffed plaintiff when he complained about the religious nature of A.A. meetings. Even though technically it is the judge, not the Probation Department, that imposes conditions of probation, in reality the Probation Department was responsible for Warner's having to attend A.A.. The Constitution deals with realities, not technicalities.

The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion...." In Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Supreme Court stated that the Establishment Clause means at a minimum that:

> government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' Lynch [v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361, 79 L.Ed.2d 604]; see also Allegheny County [v. Greater Pittsburgh ACLU, 492 U.S. 573, 591, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472] quoting Everson v. Board of

Education of Ewing, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947).

Id. at ----, 112 S.Ct. at 2655 (citations expanded; substantive alteration in original). The defendant's actions in this case violated this constitutional principle.

Unquestionably, the defendant coerced the plaintiff to attend A.A. meetings. Plaintiff's Order and Conditions of Probation stated that failure to comply with the conditions of probation could result in confinement. A somewhat harder question in this case is whether A.A. should be considered "religion or its exercise." To one with only a passing knowledge of the A.A. program, the gut answer would probably be no. However, the testimony and evidence in this case support the finding that the A.A. meetings plaintiff attended were the functional equivalent of religious exercise.

The importance of giving up one's will to a higher power was a central theme of the A.A. literature plaintiff was told to read. At meetings the plaintiff attended, the discussion centered on the idea that alcoholics are unable to overcome their addiction until they let God into their lives. A popular topic was how to start praying (one recommendation was to throw the car keys under the bed at night so you would have to get on your knees in the morning). Many of the meetings plaintiff attended opened with a prayer, and most of them ended with a group recitation of the Lord's Prayer. We find that the A.A. meetings plaintiff attended were the functional equivalent of religious exercise, and thus should be treated as religious exercise for purposes of the Establishment Clause.

Another issue we must consider is whether the Probation Department, in coercing probationers into participating in religious exercise, was acting in a way that " 'establishes a [state] religion or religious faith, or tends to do so.' " Id. This inquiry is not compelled by the language in Lee, which assumes that any

time the government coerces anyone to support or participate in religion or its exercise, it is acting in a way that establishes a state religion, or tends to do so. However, we doubt that the Lee court had the probation context specifically in mind, so we undertake a separate inquiry into whether the defendant was in fact acting in a way that establishes a state religion or religious faith, or tends to do so.

We find that sending probationers to rehabilitation programs which engage in the functional equivalent of religious exercise is an action which tends to establish a state religious faith. Of course, the defendant in this case did not have the intention of establishing a state religious faith when it coerced the probationer into attending A.A. meetings. Nonetheless, the practical effect of coercing probationers into the exercise of religion is to tend towards a state-mandated and state-approved religion. Certainly, the defendant's actions tend more toward a state establishment of religion than other state practices that the Supreme Court has found to be violations of the Establishment Clause. See Lee, 505 U.S. 577, 112 S.Ct. 2649 (including clergy who offer prayers as part of public secondary school graduation ceremony forbidden by Establishment Clause); Allegheny County v. Greater Pittsburgh A.C.L.U., 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (display of creche in county courthouse violates Establishment Clause).[2]

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[2] We admit some personal doubt that the current appellate interpretation of the Establishment Clause is consistent with the intentions of the Framers at the time the First Amendment was passed. The Framers were particularly concerned that there be no established religion such as had existed in England and other European countries, and which had caused numerous wars and uprisings. They were not, however, opposed to the public observation of religion in a non-denominational sense. This attitude persisted through the nineteenth century, and indeed even today some official, non-denominational religious practices persist, such as the presence of chaplains in the military service and in the Congress, and the words "In God We Trust" on our currency. However, in this century, consideration for the rights and attitudes of atheists and agnostics (as well as for

The defendant's actions are not justified by the fact that it was attempting to rehabilitate a person convicted of a serious offense, rather than dealing with an ordinary citizen. It would be ironic and self-defeating if in the attempt to restore offenders to full membership in our society, the state were to ignore the Constitution, our society's foremost legal statement of our values.

In short, the defendant violated the Establishment Clause by coercing the plaintiff to participate in religious exercise, an act which tends towards the establishment of a state religious faith. We are aware that this holding may be disruptive of the Department of Probation's legitimate and important efforts to rehabilitate those who have committed alcohol-related offenses. Without expressing an opinion on any legal issues outside the facts of this case, we note that in O'Connor v. California, 855 F.Supp. 303 (C.D.Cal.1994) the court upheld the constitutionality of Orange County, California's policy of requiring persons convicted of drunk driving to attend a self-help program, where A.A. was the primary program offered, but a non-spiritual alternative program called Rational Recovery was also offered.

We must now consider the issue of damages. One of plaintiff's conditions of probation was that he could not reapply for his driver's license without the permission of his probation officer. Warner's primary claim for damages is that Terwilliger refused to permit him to get back his license during his probationary period, because he did not attend enough A.A. meetings. This damages claim is not convincing. Warner's two other contemporaneous alcohol-related driving offenses were a significant impediment to his getting back his license, quite apart from Terwilliger. Plaintiff did not show that the delay in getting back

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non-Christian religions) has led to a much stricter view of what constitutes a violation of the Establishment Clause. We are of course compelled to follow the Supreme Court's teachings in this regard.

his license was due to Terwilliger's failure to grant him permission to reapply, rather than his own misdeeds. Moreover, plaintiff did not show with any specificity how he had been injured by not having his driver's license.

Warner's other damages claims are equally unconvincing. Warner complains about having his freedom of conscience violated--but from his own testimony that he refused to participate in what he considered the religious aspects of the meetings, he seems to have maintained his independence of mind without any great difficulty. He complains about the waste of his time--but we had the impression that he would have also felt his time wasted by a non-religious support group (Terwilliger noted that Warner felt he was above the other group members intellectually). We find that plaintiff is entitled to only a one dollar nominal damages award due to defendant's violation of the Establishment Clause, along with reasonable attorney's fees.

The clerk shall enter judgment for plaintiff.

SO ORDERED

Appendix G: 827 F.Supp. 261

Robert WARNER, Plaintiff,
v.
ORANGE COUNTY DEPARTMENT OF PROBATION,
Defendant.

No. 93 Civ. 1544 (GLG).

United States District Court,
S.D. New York.

July 29, 1993.

Motorist who had been convicted of alcohol-related driving offense brought § 1983 action against county Department of Probation challenging constitutionality of probation condition. On Department's motion to dismiss, the District Court, Goettel, J., held that: (1) action was not moot, even though motorist had been provided with acceptable alternative; (2) motorist was not collaterally estopped from maintaining suit in federal court; and (3) complaint adequately stated claim for violation of Establishment Clause of First Amendment arising from religious components of Alcoholics Anonymous (AA) meetings that motorist was ordered to attend as probation condition.

Motion denied.

Robert N. Isseks, Goshen, NY, for plaintiff.

Stephen R. Hunter, County Atty., Dept. of Law, Government Center Goshen, NY (Michael P. Bazell, Sr. Asst. County Atty., of counsel), for defendant.

OPINION

GOETTEL, District Judge:

This is an action for compensatory damages and injunctive relief brought by Plaintiff Robert Warner against Defendant Orange County Department of Probation.

I. STATEMENT OF THE FACTS

On November 13, 1990, Plaintiff was convicted of Driving While Ability Impaired under N.Y.Veh.Traf.Law Section 1192(1). This was Plaintiff's third alcohol-related driving offense within a period of slightly more than one year. Plaintiff received a sentence of three years probation which included several "conditions of probation." The subject of the present complaint is condition No. 5 which states: "That you will attend Alcoholics Anonymous at the direction of your probation officer." Plaintiff's Complaint at 3.

Alcoholics Anonymous (AA) is an organization dedicated to helping people recover from alcoholism. AA is not a party to this action. According to affidavits submitted by Defendant, there are over 35,000 AA programs in the United States and over one million members. Some important principles of the AA program are set forth in a pamphlet entitled "The Twelve Steps of Alcoholics Anonymous" which was allegedly distributed to Plaintiff and to many other new participants in AA. Several of these "steps" include language acknowledging the existence of a Higher Power and the necessity of subjugating oneself to such a Power as a precondition of successful treatment of alcoholism. Examples include:

....

Made a decision to turn our will and our lives over to the care of God as we understood Him.

....

Admitted to God, to ourselves and to another human being the exact nature of our wrongs.

Were entirely ready to have God remove all these defects of character.

....

Sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us and the power to carry that out.

Plaintiff's complaint at 4-5 (emphasis in original).

In addition to the "Twelve Steps", Plaintiff alleges, meetings frequently began with a prayer invoking the "Lord", and all members were encouraged to read a book written by the organization's founders, "The Big Book", which contains many references to spirituality and God. Chapter Four of "The Big Book", entitled "We Agnostics," provides:

> To one who feels he is an atheist or agnostic such an experience seems impossible, but to continue as he is means disaster.... To be doomed to an alcoholic death or to live on a spiritual basis are not always easy alternatives to face.... About half our original fellowship were exactly of that type. At first some of us tried to avoid the issue, hoping against hope we were not true alcoholics. But after a while we had to face the fact that we must find a spiritual basis of life--or else.

Plaintiff's Complaint, Exhibit B at 1. Members are encouraged to consider their own conception of "God".

Plaintiff claims to be an atheist. He claims to have protested to his probation officers in 1990 when the sentence was imposed, as well as several times thereafter, that he found his forced participation in AA to be repugnant because it is religious in

nature and because of its repeated emphasis on God and spirituality. Plaintiff does not object to alcohol rehabilitation programs per se as a condition of his probation, only to the specific make-up and character of AA. Defendant claims that, although Plaintiff complained about his requirement to attend AA meetings because he felt he did not need treatment, he did not articulate a protest on religious grounds until the summer of 1992.

Plaintiff brought suit in July 1992 in the local criminal court arguing that the condition of his probation which required him to attend AA meetings violated his constitutional right to free exercise of religion.

On or about August 17, 1992, Plaintiff's probation officer provided him with names and telephone numbers of three alcohol abuse counselors who would be able to provide the treatment in lieu of the AA program without an emphasis on God or spirituality.

By order dated September 11, 1992, the criminal court dismissed Plaintiff's motion as moot.

Plaintiff now claims that his forced participation in AA as an element of his probation constituted a violation of the Establishment Clause of the U.S. Constitution. He requests injunctive relief and compensatory damages under 42 U.S.C. § 1983.

II. DISCUSSION

A. MOTION TO DISMISS

We can only grant a motion to dismiss where "it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80

(1957); Branum v. Clark, 927 F.2d 698 (2d Cir.1991) (when plaintiff alleges civil rights violations, courts should apply the rule of no dismissal unless beyond doubt that no set of facts can be proved in support of claims with particular strictness).

In reviewing a motion to dismiss, "the factual allegations in the complaint must be accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff." Frazier v. Coughlin, 850 F.2d 129, 129 (2d Cir.1988).

B. MOOTNESS

Article III of the United States Constitution restricts the decision making power of the federal judiciary to cases involving "a case or controversy." Plaintiff must "demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). Since Plaintiff has been provided with names and telephone numbers of alcohol abuse counselors acceptable to him, no controversy seems to remain with respect to the requested injunctive relief.

However, "[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable." Stokes v. Wurtsboro, 818 F.2d 4, 6 (2d Cir.1987). It is difficult to see how Plaintiff could have sustained compensatory damages merely from being exposed to religious dogma. However, even if Plaintiff suffered no compensatory losses, he may be entitled to nominal damages of $1 and attorney's fees. See, e.g., White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1056 (2d Cir.1993). In any event, Plaintiff has demanded compensatory damages, and we must proceed to the merits of his case.

C. ESTOPPEL

Defendant claims that this issue has been adjudicated in the local criminal court and therefore Plaintiff must appeal that decision if he is dissatisfied with it. Since he has not done so, Defendant asks us to find that Plaintiff is collaterally estopped from bringing this claim in federal court. We decline to do so. The local criminal court determined that:

> This court, under the facts presented, will not rule that the AA program as offered intrudes upon the defendant's rights or in any way requires him to practice religion under the 'threat' of imprisonment. Predicated upon the facts adduced, the Court finds that there are suitable other alternatives made available to the defendant as presented by the Orange County Department of Probation to attendance at AA that the defendant's current motion is rendered academic or moot.

People v. Warner, (Town of Woodbury Justice Court, September 11, 1992). As a criminal defendant, Plaintiff had brought an action for injunctive relief only. The local criminal court never adjudicated the issue of whether Plaintiff's rights were violated by the religious nature of AA, nor did the court address the question of damages. Therefore, Plaintiff cannot be collaterally estopped from litigating this issue before us by the proceedings of the local court.

D. ESTABLISHMENT CLAUSE VIOLATION

Plaintiff claims to be an atheist and alleges that the spiritual nature of the AA program he attended as a condition of his probation deprived him of the rights guaranteed by the Establishment Clause of the First Amendment of the Constitution of the United States.

1. Constitutional Standards

The Supreme Court's treatment of the Establishment Clause has undergone substantial changes during the last half of this century, questioning practices that were common during the first 150 years following the passage of the First Amendment. We suspect that we have not seen the last of these changes. The Supreme Court once noted that "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952). The Court has further noted that:

> [t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings.... This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life.School Dist. of Abington Township v. Schempp, 374 U.S. 203, 213-14, 83 S.Ct. 1560, 1566-67, 10 L.Ed.2d 844 (1963).

" 'Although Establishment Clause jurisprudence is characterized by few absolutes,' at a minimum 'the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.' " Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, ----, 113 S.Ct. 2462, 2473, 125 L.Ed.2d 1 (1993) (BLACKMUN, J. dissenting) (quoting Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385, 105 S.Ct. 3216, 3223, 87 L.Ed.2d 267 (1985)). The First Amendment "did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a 'broad interpretation ... in the light of its history and the evils it was designed forever to suppress." McGowan v. Maryland, 366 U.S. 420, 442, 81 S.Ct. 1101, 1113, 6 L.Ed.2d 393 (1961)

(quoting Everson v. Board of Education, 330 U.S. 1, 14-15, 67 S.Ct. 504, 510-11, 91 L.Ed. 711 (1947)). Government, therefore, "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

Consistent with that belief, the Court "has unambiguously concluded that the individual freedom of conscience protected by the first Amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 472 U.S. 38, 53, 105 S.Ct. 2479, 2487-88, 86 L.Ed.2d 29 (1985). Under the Free Exercise Clause, "government may not compel affirmation of religious belief". Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876 (1990).

The Court has further "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." School Dist. of Abington Township, 374 U.S. at 216, 83 S.Ct. at 1568; See also, Lee v. Weisman, 505 U.S. 577, ---- - ----, 112 S.Ct. 2649, 2668-2671, 120 L.Ed.2d 467 (1992) (SOUTER, J. concurring). Supreme Court jurisprudence clearly indicates that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." School Dist. of Abington Township, 374 U.S. at 220, 83 S.Ct. at 1570; Torcaso v. Watkins, 367 U.S. 488, 495, 81 S.Ct. 1680, 1683- 84, 6 L.Ed.2d 982 (1961).

On the basis of Supreme Court Establishment Clause jurisprudence, therefore, we find that atheism falls within the protection of the First Amendment.

2. State-imposed obligation to attend AA meetings

Attendance at AA meetings was an explicit condition of Plaintiff's probation. According to the Order and Conditions of Probation signed by the criminal court which sentenced Plaintiff, failure to satisfactorily perform the conditions of probation could result in Plaintiff "being returned to the Court for further action, which may result in your possible confinement." Plaintiff's Complaint, Exhibit A at 1. While Plaintiff would not necessarily be incarcerated if he did not follow all of the conditions of probation, such action was reasonably within Plaintiff's contemplation while he was considering whether or not to attend the AA meetings. Plaintiff could have rejected the alcohol treatment for religious reasons, but only at the potential cost of incarceration.[1] Such a condition would seem to fit within the meaning of "obligatory" as interpreted by the United States Supreme Court.

The Supreme Court has held that attendance and participation at a secondary school graduation ceremony which included non-sectarian prayer is "in a fair and real sense obligatory, though the school district does not require attendance as a condition for the receipt of the diploma." Lee, 505 U.S. at ----, 112 S.Ct. at 2655. The Court went on to hold that a "school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." Id. If the Supreme Court deems such participation to be obligatory and imposed by the State, we cannot but find in this case that the government has "plac[ed] its official stamp of approval" on Plaintiff's participation in AA. See

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[1] We note that there may be a problem even after alternative treatment programs are provided if the alternative programs were provided at some higher financial cost to the probationer.

Engel v. Vitale, 370 U.S. 421, 429, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962).

3. The Role of Lemon v. Kurtzman

The underlying principle of the Establishment Clause has been clearly set forth by the Supreme Court. "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religion organizations or groups and vice versa." Everson, 330 U.S. at 16, 67 S.Ct. at 512. However, analyzing Establishment Clause violations has not proved simple. The Court recognized in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Id. at 612, 91 S.Ct. at 2111. It then offered the clearest test laid down in recent years for analyzing these issues.

Essentially, the three criteria offered in Lemon are: 1) the policy must have a secular legislative purpose; 2) the principal or primary effect must be one that neither advances nor inhibits religion; and 3) the policy must not foster excessive government entanglement with religion. Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111. Since then, the Lemon test has been widely used by federal courts at all levels. See Lamont v. Woods, 948 F.2d 825, 841 (2d Cir.1991); see also, Otero v. State Election Bd. of Oklahoma, 975 F.2d 738, 740 (10th Cir.1992); Chabad-Lubavitch of Georgia v. Miller, 976 F.2d 1386, 1392 (11th Cir.1992). Writing in 1992, Justice Blackmun noted that "[s]ince 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), has the Court not rested its decision on the basic principles described in Lemon." Lee, 505 U.S. at ---- n. 4, 112 S.Ct. at 2663 n. 4 (BLACKMUN, J. concurring).

AA has undoubtedly been the most successful organization in dealing with the problems of alcoholics. The policy of requiring probationers with drinking problems to attend AA does serve a secular purpose of preventing drunk driving. However, to the extent that AA is the selected organization, since it allegedly relies upon religious indoctrination to enforce its principles, it arguably has a primary effect of advancing religion. Since the state court has directed Plaintiff's participation, it could be viewed as excessive government entanglement with religion. Plaintiff claims that the pervasive references to "God" and "spirituality" along with the psychological pressure to accept the AA beliefs, which he allegedly encountered in the AA literature and in the meetings he was compelled to attend, did, in fact, inhibit his religious beliefs (or, more accurately, absence of religious beliefs). At a minimum, the complaint adequately alleges a violation of the establishment clause.

However, we are wary of relying upon Lemon v. Kurtzman. Recent decisions, although neither directly overturning nor limiting the Lemon holding, seem to indicate that the Court does not intend to rely so heavily upon it. See, e.g. Lee, 505 U.S. at ----, 112 S.Ct. at 2685 (SCALIA, J. dissenting) (noting that the Court found a state-sponsored religious exercise although essentially ignoring the Lemon criteria); Zobrest, --- U.S. at ----, 113 S.Ct. at ---- (appellate court decision relying on Lemon overturned); Southside Fair Housing Committee v. New York, 928 F.2d 1336, 1344-47 (2d Cir.1991) (applying Lemon test but expressing doubts as to whether it would continue to be applicable following Lee v. Weisman, then pending in the Supreme Court).

4. Religious nature of AA meetings

We must, therefore, analyze the present case without undue reliance on the Lemon criteria. "There is no doubt that attempts to aid religion through government coercion jeopardize freedom

of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe." Lee, 505 U.S. at ----, 112 S.Ct. at 2665. Plaintiff has complained of the pervasive spiritual element in AA meetings and literature. Defendant suggests that the spiritual element in AA is "flexible" and should not be problematic. This is not the law. That "the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors." Id. 505 U.S. at ----, 112 S.Ct. at 2659.

Defendant has noted that the pamphlet containing the "Twelve Steps" refers, in places, to "God as you understand him " in an apparent attempt to remove references to any particular religion or, perhaps, to religion itself. An appendix to "The Big Book" notes that, although "it was not our intention to create such an impression, many alcoholics have nevertheless concluded that in order to recover they must acquire an immediate and overwhelming 'God- consciousness' " but that "such transformations, though frequent, are by no means the rule.". Defendant's Motion to Dismiss, Exhibit D at 3. The question here, however, is not the good faith of Defendant or AA in attempting to make the spiritual element acceptable to most persons, but the legitimacy of their requiring attendance in a treatment program which, Plaintiff alleges, emphasizes prayer and spirituality. See Lee, 505 U.S. at ----, 112 S.Ct. at 2656. General acceptance of the spiritual element by members of AA does not affect our decision.

> [I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state- created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

Id. 505 U.S. at ----, 112 S.Ct. at 2658.

The case upon which Defendant relies for the proposition that AA is not a religious organization, Stafford v. Harrison, 766 F.Supp. 1014 (D.Kan.1991), draws its legal justification from a misapplication of Justice Douglas' concurring opinion in U.S. v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). Stafford finds that "the belief in a Supreme Being 'cannot be sustained as a distinguishing characteristic of religion.' " Stafford, 766 F.Supp. at 1017. The passage from Seeger cited by the Stafford court stands not for the proposition that reference to a Supreme Being does not make something a 'religion', but for the proposition that belief in a Supreme Being is not a prerequisite for a religion. In fact, Douglas specifically notes Hinduism and Buddhism as religions which do not include a concept of a Supreme Being. As a result, we base our analysis upon decisions of the Supreme Court rather than upon Stafford.

At oral argument, we were told by Defendant that each chapter of AA is operated independently and that some do not rely heavily on religious practices. If this is indeed true, the direct holding in this case may apply only to the specific chapter attended by Plaintiff and not to AA as a national organization. Consequently, this gives us an added reason to rely heavily on the specific facts of this case in resolving this issue, something that will be impossible if the action does not proceed to trial or at least a summary judgment motion.

Examining Plaintiff's allegations, we cannot hold as a matter of law that the chapter of AA whose meetings Plaintiff was compelled to attend does not have an objectional religious component.

5. Vulnerability of Plaintiff

Even if the court determines that Plaintiff was compelled to attend meetings at the chapter of AA and that such meetings were religious in nature, it does not necessarily follow that

Plaintiff experienced a violation of his rights under the First Amendment. In Lee, the Supreme Court limited its decision that coerced exposure to a non-sectarian benediction violated the Establishment Clause to a situation where school-children were affected. "We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." Lee, 505 U.S. at ---- - ----, 112 S.Ct. at 2658-59. Pointing both to case law and psychological studies, the Court noted the susceptibility of adolescents to pressure from their peers toward conformity and the importance of protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Id.

Because "Establishment Clause jurisprudence remains a delicate and fact- sensitive one", Lee, 505 U.S. at ----, 112 S.Ct. at 2661, we cannot hold as a matter of law that Plaintiff, a recovering alcoholic facing the threat of incarceration, is significantly less susceptible to the coercive pressure he alleges occurred in the AA meetings than were the secondary school students to the coercive pressure they experienced during the prayers offered at their graduation ceremony. We note that, as alleged by Plaintiff, the pressure exerted by AA to accept a form of spirituality seemed considerably more forceful than that exerted upon the school-children, for example where AA literature informs Plaintiff that he "must find a spiritual basis of life--or else." Plaintiff's Complaint, Exhibit E at 1.

In Marsh v. Chambers, supra, the Court held that the policy in the Nebraska legislature of beginning each of its sessions with a prayer by a Chaplain paid by State funds did not violate the Establishment Clause. The Court recently distinguished that case as pertaining specifically to the "atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons". Lee,

505 U.S. at ----, 112 S.Ct. at 2660. In Marsh, the Court noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' " Marsh, 463 U.S. at 792, 103 S.Ct. at 3336. We cannot apply the same reasoning in this case because, unlike the complaining parties in Marsh, Plaintiff was not allowed to come and go as he pleased but was required to attend the activity where the alleged violation occurred. Nor are we certain that Plaintiff, as a recovering alcoholic, was not significantly more susceptible to religious indoctrination than the "adults" referred to in Marsh. We call attention to Torcaso v. Watkins, where the court struck down a provision of the Maryland Constitution requiring public officials to declare a 'belief in the existence of God.' See Torcaso, 367 U.S. at 489, 81 S.Ct. at 1680-81. We would hope that the Court did not so hold because of a fear of the susceptibility of public officials to religious indoctrination. Where the party's presence and participation in the alleged religious conduct are mandatory, Marsh's reasoning carries less force.

For these reasons we cannot grant Defendant's motion to dismiss.[2]

E. VALIDITY OF PRISON POLICIES

As a final matter, Defendant argues that requiring Plaintiff to attend AA is a prison policy and should therefore be presumptively valid. Although Plaintiff was not in prison when he was ordered to attend AA meetings, the violation of the condition of his probation might have resulted in his being imprisoned, leading us to consider this condition on par with prison policies for the purposes of legal inquiry. The Supreme Court has held

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[2] We note, however, that Alcoholics Anonymous is not a party. It may be necessary for Plaintiffs to join the organization as a defendant to this action in order to properly examine the factual issues raised by the case.

that where a challenged prison policy impinges on an inmate's constitutional rights, the policy is valid if it is reasonably related to legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349, 107 S.Ct. 2400, 2404-05, 96 L.Ed.2d 282 (1987). Factors relevant to this analysis of reasonableness include: 1) whether there is a logical connection to the governmental interest invoked to justify it; 2) whether alternative means of exercising the constitutional right remain open to inmates; 3) the impact of accommodating the constitutional right on staff and other inmates and the allocation of prison resources; and 4) whether the policy represents an exaggerated response to institutional concerns. Turner v. Safley, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62, 96 L.Ed.2d 64 (1987).

Applying these factors to the present case, it seems apparent there is a logical connection to the governmental interest of preventing drunk driving. As noted earlier, AA is widely used in penal systems across the United States and has an admirable record of success in treating people with alcohol problems. See, e.g., Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); Williams v. Ward, 556 F.2d 1143, 1146 (2d Cir.1977). However, as our previous discussion indicates, Plaintiff's means of exercising his First Amendment rights in the face of such a policy are not at all clear. See, e.g., Lee, 505 U.S. at ----, 112 S.Ct. at 2665. Furthermore, the ease with which Defendant acquiesced to Plaintiff's request for alternate treatment together with the rarity of such requests suggest to us that the impact on the County penal system of accommodating Plaintiff's right would not be significant.

We find that, based on Plaintiff's factual allegations, the specific application of this policy to Plaintiff overcomes the presumptive validity of prison policies, if this be considered one.

III. CONCLUSION

For the foregoing reasons, we hold that Plaintiff has stated a claim under 42 U.S.C. § 1983 and is not estopped from bringing this case in our court. We therefore deny Defendant's motion to dismiss.

SO ORDERED.

APPENDIX H - Decision and Order of Town of Woodbury Justice Court dated September 11, 1992

JUSTICE COURT OF THE STATE OF NEW YORK
TOWN OF WOODBURY: COUNTY OF ORANGE
_____X

PEOPLE OF THE STATE OF NEW YORK,

-against-

Decision/Order

ROBERT H. WARNER,

Defendant.
_____X

Robert H. Warner, by affidavit dated July 14, 1992 accompanying his notice of motion, has moved before this Court for an order declaring that the condition of the defendant's sentence of probation imposed by this Court on November 13, 1990, which *inter alia* required him to attend Alcoholics Anonymous violated the establishment clause of the First Amendment of the United States Constitution and setting aside such condition of sentence pursuant to Criminal Procedure Law Section 440.20. The District Attorney's Office, by affirmation of David R. Huey, Assistant District Attorney, opposes the application.

Mr. Huey, in substance claims that the defendant's application is moot since the defendant was provided the opportunity to use alternative alcoholic counselors who in no way inject religion or spirituality into their drug rehabilitation program.

The facts are simple.

On February 3, 1990 the defendant was arraigned at 4:15 a.m. on charges of driving while ability impaired, aggravated unlicensed operation as a felony and several other vehicle and traffic violations.

On September 4, 1990 a plea of guilty was entered into by the defendant in which he acknowledges his guilt for DWAI (Vehicle & Traffic Law Section 1192(1) and aggrevated unlicensed operation third degree 511.1A(2)).

On November 13, 1990 after receipt and review of a pre-sentence report the defendant was sentenced to monetary fines and three years probation. The probation aspect of his sentence included special alcoholic conditions including the requirement as proposed by the Orange County Department of Probation that defendant attend Alcoholics Anonymous.

Now, a significant time into his three year probation the defendant objects to his attendance at Alcoholics Anonymous due to the fact that Alcoholics Anonymous "utilizes meditation throughout its meetings, and the condition of my probation which requires I attend these meetings is effectively compelling me to practice religion with a threat of imprisonment if I refuse to comply".

I do note that no appeal was taken by the defendant from the sentence imposed and now almost two years into the sentence the defendant brings on the instant motion.

This Court, under the facts presented, will not rule that the AA program as offered intrudes upon the defendant's rights or in any way requires him to practice religion under the "threat" of imprisonment. Predicated upon the facts adduced the Court finds that there are suitable other alternatives made available to the defendant as presented by the Orange County Department of

Probation to attendance at AA that the defendant's current motion is rendered academic or moot.

The Court finds that suitable alternatives have been made available to the defendant to enable him to avoid his fears and concerns with regard to AA. The Court directs the Orange County Department of Probation that these alternative programs should be employed by it as an alternative to Alcoholics Anonymous.

Defendant in letter from his attorney dated August 26,1992 (which he requests be deemed as a reply affirmation to the Huey affirmation) objects to these alternate means of treatment since it will cost him money. The Court notes, however, that the Orange County Department of Probation could have required as a condition of three year probation:

> "That you enter a facility or rehabilitation program for the treatment of alcoholism as may be deemed necessary by the Department of Probation, and that you remain in said facility or program until satisfactory completion including all aftercare deemed necessary."

The defendant could have been saddled with the cost of in-patient rehabilitation program. The defendant cannot avoid the rehabilitation program offered as an alternative predicated upon his claim that it will cost him money. The Court could have imposed in-patient treatment at defendant's cost without going through the Department of Probation. The fact that it costs the defendant money to attend these programs is not a legitimate basis for the defendant's objection to attending them. The state need not be the financial benefactor to defendant to assist him in his alcoholic rehabilitation.

Accordingly, with the directions above stated, the defendant's motion is denied.

Dated: Highland Mills, New York
September 11, 1992

s/David L. Levinson
David L. Levinson, Justice
Town of Woodbury

TO: ROBERT ISSEKS, ESQ.
DAVID R. HUEY, ESQ.
Assistant District Attorney

No. 99-24

FILED
SEP 29 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1999

ORANGE COUNTY DEPARTMENT OF PROBATION,

Petitioner,

v.

ROBERT WARNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Twelve Steps of Alcoholics Anonymous constitute religious doctrine and practice within the meaning of the Establishment Clause of the First Amendment?

2. Does government coerced attendance at Alcoholics Anonymous meetings violate the Establishment Clause of the First Amendment?

3. Was it reasonably foreseeable that the sentencing judge would adopt Orange County Probation Department's recommendation that Warner be required to attend Alcoholics Anonymous meetings?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of the Argument

Respondent Robert Warner ("Warner") brought this suit under 42 U.S.C. 1983 to obtain declaratory and compensatory relief on his claim that petitioner Orange County Department of Probation ("Probation Department") coerced him into attending Alcoholics Anonymous ("A.A.") meetings in violation of the Establishment Clause of the First Amendment to the United States Constitution. By Opinion dated December 19, 1994, the District Court for the Southern District of New York (Hon. Gerard L. Goettel) found that the idea of requiring Warner to attend A.A. originated with the Probation Department, that "the A.A. program that Warner experienced placed a heavy emphasis on spirituality and prayer, in both conception and practice," (91a) that Warner was "unquestionably coerced" (93a) to attend A.A. meetings that were "the functional equivalent of religious exercise" (93a) and that such coercion "tends to establish a state religious faith" in violation of the Establishment Clause. (94a)

The Court of Appeals below agreed with the District Court, stating that "[t]he A.A program to which Warner was exposed had a substantial religious component" and that it had "no doubt that the [A.A.] meetings Warner attended were intensely religious events." The Court of Appeals also had "no doubt . . . that Warner was coerced into participating in these religious exercises by virtue of his probation sentence," since if he failed to attend A.A., he "would have been subject to imprisonment for violation of probation." (36a-37a)

The Court of Appeals upheld the District Court's finding that the Probation Department's "recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy,"(27a-28a) and found citing *Malley v. Briggs*, 475 U.S. 335, 334 n. 7 (1986) that the A.A. conditions in Warner's sentence was a "natural consequence" of that general policy.

Statement of Facts

I. The Policy of the Probation Department

On November 13, 1990, before the Justice Court of the Town of Woodbury, County of Orange, State of New York, Warner pled guilty to the charges of aggravated unlicensed operation of a motor vehicle in the second degree [N.Y.S. Veh. Traf. Law Sec. 511(2)] and driving while ability impaired [N.Y.S. Veh. Traf. Law, Sec. 1192(1)]. The Justice Court thereupon ordered the Probation Department to prepare Warner's pre-sentence investigation report. When the Probation Department presented its report to the Justice Court, it included a pre-printed form, drafted by the Probation Department, entitled "Standard Conditions of Probation"[1] This form was used by the Probation Department county-wide and was included in every pre-sentence investigation report where the defendant to be sentenced might receive a period of probation.

Attached to the "Standard Conditions" form in Warner's pre-sentence report was another pre-printed form, also drafted by the Probation Department, entitled "Additional Conditions of Probation Pertaining to Alcohol." This form stated in pertinent part: "Your

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[1] Warner's Exhibit "2" provides in pertinent part the following:

In accordance with Section 65 of the Penal Law, you have been sentenced by the Court to a (3) three-year period of Probation. While on Probation, you are in the legal custody of the COURT. If your community adjustment is favorable, you can be discharged from probation before the maximum expiration date, if so ordered by the COURT.

While on probation, you shall faithfully observe the conditions of your probation. You realize that a violation of these conditions or any others imposed by the COURT may result in your being returned to the COURT for further action, which may result in your possible confinement.

Your conditions of probation are:

* * *

Other special conditions:

Special Alcohol Conditions (as per attached)

* * *

probation is subject to the following additional conditions * * * That you will attend Alcoholics Anonymous at the direction of your probation officer." This directive was included in the Probation Department's pre-sentence report whenever it may be relevant to the prospective probationer.

The Probation Department did not consult with the sentencing judges in Orange County when it introduced its "Additional Conditions of Probation Pertaining to Alcohol". But when the Probation Department drafted this form, it was aware of the fact that Alcoholics Anonymous utilized the "Twelve Steps of Alcoholics Anonymous" (See Appendix A. at pps. 1a - 2a).

Prior to and throughout the time that Warner was on probation, it had been the Probation Department's policy to use the Twelve Steps to monitor probationers who were subject to the additional alcohol conditions as to whether they were gaining any insight in terms of themselves and their use of alcohol.

From as early as December 13, 1990, Warner's probation officer, Neal Terwilliger, directed Warner to attend three A. A. meetings per week. Throughout the period that Terwilliger was Warner's probation officer he required Warner to turn in an "A.A. Monitoring Sheet", the purpose of which was to verify that Warner, as with all probationer's similarly situated, was, in fact, attending A. A. meetings as directed.

Warner's uncontroverted testimony at trial was that the vast majority of the A.A. meetings that he attended involved discussions about God, how hopeless an alcoholic was until he or she accepted God into his or her life, and how to start praying. On January and February 1991, Warner told Terwilliger that the A. A. meetings were

too religious-based for him, but Terwilliger persisted to direct Warner to attend the meetings.[2]

On August 4, 1992, before the Town of Woodbury Justice Court, Warner moved pursuant to N.Y.S. Criminal Procedure Law Section 440.20 to challenge the constitutionality of that part of his sentence which imposed, as an express condition of his probation, the requirement that he attend A. A. at the direction of his probation officer. The Justice Court never ruled on the constitutional issue and, instead, ruled that the motion was moot because the Probation Department presented Warner with suitable alternatives to A.A.

II. The Religious Nature of the Twelve Step Program

The religiously indoctrinating nature of the Twelve Step program is explained in the two basic A. A. publications, *Twelve Steps and Twelve Traditions*, and *Alcoholics Anonymous*, commonly referred to as the "Big Book". Both of these books were received in evidence at trial.

Twelve Steps and Twelve Traditions ("TSTT") "presents an explicit view of the principles by which A.A. members recover and by which their Society functions." (Preface TSTT 15) "It is hoped," write the authors, "that this volume will afford all who read it a close-up view of the principles and forces which have made Alcoholics Anonymous

---

[2] During the spring and summer of 1991, Terwilliger perceived Warner as "13 stepping", which meant that Warner was critical of the program and didn't see any sense in it. Thus, one of Terwilliger's "behavioral objectives" for Warner for the quarter following August 13, 1991, was that Warner attended A.A. "Step meetings" and, on October 16, 1991, Terwilliger so directed Warner. Step meetings were distinct from the other kinds of A.A. meetings in that at a Step meeting the group discussion would be confined to one particular Step of the Twelve Steps. One of Terwilliger's behavioral objectives at the end of the period from November 14, 1991, to February 13, 1992, was for Warner to "attend three A.A. step meetings every week, and obtain a sponsor". Terwilliger viewed Warner's attendance at three Step meetings per week as an objective which was part of Warner's "working the Steps" of the program.

what it is." (Preface TSTT 18) The book elaborates, chapter by chapter, upon each of the Twelve Steps. (See Appendix B. at pps. 3a - 8a).

The District Court found that *Alcoholics Anonymous* (the "Big Book") is "A.A.'s basic text" and that "the central theme" of the book is the "emphasis on a higher power". As "an all-purpose guide for anyone having problems working the Twelve Steps", the Big Book's main object is 'to enable [the reader] to find a Power greater than [himself] which will solve [his] problem," and that it is "spiritual as well as moral." (See Appendix C. at p. 9a).

A preliminary step in the A.A. program requires the participant to admit the existence "of a Creative Intelligence, a Spirit of the Universe underlying the totality of things. . ." (Big Book, page 46). Once this step is taken, the participant is to be possessed with a new sense of "power and direction." The program provides that "[a]t the start, this was all [the participant] needed to commence spiritual growth, to effect [his] first conscious relation with God as [he] understood Him." (Big Book, page 47) As soon as the participant can say that "he does believe, or is willing to believe, . . .[the program] emphatically assures him that he is on his way" and that a "wonderfully effective spiritual structure can be built." (Big Book, page 47)

Reasons For Denying The Writ

I. It Is Well Settled That the Twelve Steps of Alcoholics Anonymous Constitute Religious Doctrine and Practice Within the Meaning of the Establishment Clause of the First Amendment

The Orange County Probation Department contends that certiorari should be granted so that this Court can determine whether A.A. is "sufficiently religious" for Establishment Clause purposes. The Probation Department misleads this Court by stating that this issue has resulted in a "split of opinions around the country". The Probation Department then contends that this "split" has been caused by some courts using the three-pronged *Lemon* test and others using the *Lee v.*

Weisman coercion test. The Probation Department then asks this Court to end this "confusion".

Actually, the only entity "confused" by this issue is the Probation Department. Its confusion begins with its apparent belief that whether a court applies *Lemon* or *Lee* will make a difference on the threshold issue of whether the Twelve Steps constitute religious practice. The Probation Department's confusion continues with its disingenuous attempt to convince this Court that two discredited district court opinions have caused a "split of opinions around the country".

In *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996), *cert den* 519 U.S. 1054 (1997), the New York Court of Appeals observed that the A.A. literature "demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization." The N.Y. Court of Appeals explained that followers of the Twelve Steps

> are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings. These expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes, no less than the nondenominational prayer in *Engel v Vitale* (370 US 421), that is, "a solemn avowal of divine faith and a supplication for the blessings of the Almighty. The nature of such a prayer has always been religious'" (id., at 424 [emphasis supplied]; see also, *Lee v Weisman*, 505 US __, __, 112 SCt 2649, 2664 [Blackmun, J., concurring]).

Griffin, 88 N.Y.2d at 683 (emphasis in original). The *Griffin* Court further observed:

> [A] fair reading of the fundamental A.A. doctrinal writings discloses that their dominant theme is religious . . . Indeed, the A.A. basic

> literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions. Thus, God is named or referred to in five of the 12 steps . . . While A.A. literature declares an openness and tolerance for each participant's personal vision of God ("*as we understood Him*" [Steps 3 and 11] [emphasis in the original]), the writings demonstrably express an aspiration that each member of the movement will ultimately commit to a belief in the existence of a Supreme Being of independently higher reality than humankind . . . Aside from the obvious difficulty in conceptualizing how one could perform a confessional of "wrongs" (Step 5) or seek, through "prayer," "contact" (Step 11) with a God devoid of religious content," and even if "A.A. permits a secular interpretation of its doctrines and practices, undeniably its paramount theme . . . favors a religious interpretation.

Griffin, 88 NY2d at 681-682, 689. These findings led the Court of Appeals to reject the New York Attorney General's position that "the Establishment Clause was not violated because other A.A. writings suggest a toleration of belief in a "God" as merely some "Higher Power" without any religious content". *Griffin*, 88 NY2d at 688. The Court concluded that the Attorney General's "defense fails under the 'wholesome *neutrality*' requirement of the Establishment Clause." *Griffin*, 88 N.Y.2d at 689, *citing Abington School Dist. v Schempp*, 83 S.Ct. 1560, 1571-72 (emphasis supplied in *Griffin*).

Even if this Court were to go so far as to accept the Probation Department's suggestion that words like "God" and "prayer" and "Him" and "Higher Power" and "spirituality" can be given a neutral or secular "spin" (which, of course, they really can't), the Establishment Clause would still be violated. This is because the First Amendment "forbids" even "subtle departures from neutrality". *Gillette v United States*, 401 U.S. 437, 452 (1971) . . . *quoted in Church of Lukumi Babalu Aye v Hialeah*, 113 S.Ct. 2217, 2227 (1993). The religious indoctrination inherent in a departmental policy of recommending, endorsing and using the Twelve Steps is not erased, or even minimized, simply by labeling it "spiritual" or "therapeutic".

The Probation Department's heavy reliance upon A.A.'s conclusory, self-serving disclaimer that the Twelve Step process is not "religious,"[3] not only has been rejected by the New York Court of Appeals,[4] it is presently being *uniformly* rejected in the federal courts.

In *Kerr v Farrey*, 95 F.3d 472, 497-480 (7th Cir. 1996) the Seventh Circuit Court of Appeals rejected the argument that the "program escaped the 'religious' label because the twelve steps used phrases like 'God, as we understood Him,' and because the warden indicated that the concept of God could include the non-religious idea of willpower within the individual." The Seventh Circuit reasoned that because "[a] straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being."[5] *Id.* See, also, *O'Connor v State of Cal.*, 855 F.Supp. 303, 307-308 (C.D.Cal. 1994) which, prior to *Kerr*, drew the same conclusion that A.A., for purposes of First Amendment analysis, is not only religious, but specifically "monotheistic" in its basic principles:

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[3] The Probation Department also suggests that because A.A. purportedly does not embrace one particular religion it does not violate the First Amendment. But even assuming that the A.A. requirement does include the principle of non-affiliation, this still would not remove it from the scope of the Establishment Clause. In *Abington v Schempp*, 374 U.S. at 216, the Supreme Court observed how it "has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." *Abington*, 374 U.S. at 216. See, also, *Grand Rapids School Dist. v Ball*, 473 US 373, 382, where this Court observed that the government must "maintain a course of neutrality among religions, and between religion and nonreligion. . . "

[4] *See, Arnold v Tennessee Board of Parole*, 956 S.W.2d 478 (Tenn. 1997) (Supreme Court of Tennessee held that a prisoner's failure to attend A.A. meetings could not be considered in the decision to grant or deny parole because the State cannot require participation in A.A. therapy without offering a secular alternative)

[5] The Seventh Circuit went on to point out that the phrase "God, as we understood Him," stressed by the Probation Department to show the so-called flexibility of the "God" concept, really works against the State, since the phrase refers to God as "Him". *Kerr*, 95 F.3d at 480. The Seventh Circuit determined that the Twelve Steps are "fundamentally based on a religious concept of a Higher Power." *Kerr*, 95 F.3d at 480.

> Spirituality is a central part of the Alcoholics Anonymous philosophy, and the program contains religious overtones. While A.A. is not a "religion" -- various faiths may all participate without renouncing their religious convictions -- a review of the "Big Book of Alcoholics Anonymous" reveals that it is founded on monotheistic principles.

The Second Circuit below stated that it had "little difficulty concluding that the constitutional line was crossed" by the government's endorsement of, and requirement of participation in, the Twelve Step program. Addressing the disclaimer argument now being propounded to this Court by the Probation Department, and specifically that argument's reliance upon *Stafford v Harrison*, 766 F.Supp. 1014 (D.Kan. 1991),[6] the Second Circuit observed that

> *Stafford* involved a mandatory prison-based substance abuse program, structured around the principles of A.A. The court upheld the program, arguing that A.A.'s notions of a "higher power" and "God" were sufficiently flexible and non-denominational that the program could not be said to constitute a "religion." This is a misapplication of First Amendment doctrine, which prohibits coerced participation in religious exercise of any variety for its favoritism of religion over non-religion. We decline to follow that case, which has been criticized for misreading relevant Supreme Court precedent.[7]

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[6] The *Stafford* court, pointing to the disclaimer in the "Big Book", held that "[w]hile the spiritual nature of Alcoholics Anonymous cannot be denied, the court is not persuaded this program is a religion." 766 F.Supp. at 1016. The holding in *Jones v Smid*, (4-89-CV-20857), the unpublished 1993 Southern District of Iowa decision also cited in the instant petition, expressly adopted the reasoning in *Stafford*.

[7] In the District Court decision below, the reasoning in *Stafford* was found faulty and rejected as follows:

> The case upon which Defendant relies for the proposition that A.A. is not a religious organization, *Stafford v Harrison*, 766 F.Supp. 1014 (D.Kan. 1991), draws its legal justification from a misapplication of Justice Douglas' concurring opinion in *U.S. v. Seeger*, 380 U.S. 163 (1965). *Stafford* finds that "the belief

Stafford was also rejected in *Scarpino v Grosshiem*, 852 F.Supp. 798, 804 (S.D.Iowa 1994) which described the reliance upon A.A.'s disclaimer as "dubious."[8]

After the hearing on remand in June of 1997, the District Court below made the further finding that "[t]he A.A. program for combating addictive alcoholism is deeply religious." (15a)

In *Warburton v. Underwood*, 2 F.Supp.2d 306 (W.D.N.Y. 1998), a district court rejected a qualified immunity defense by finding that the plaintiff had a *clearly established right* in 1998 not to be coerced into a Twelve Step program by New York State.

As observed by one commentator, "judicial consensus is emerging behind the proposition that AA is a religious program for Establishment Clause purposes. Therefore, courts facing cases that involve the issue of AA's religiousness should devote little, if any, analysis to this question." 97 Columbia Law Review, 437, 448 (March, 1997) The Twelve Step modality of indoctrination does not lose its religiosity simply because the County might be of the view that A.A. is effective or that some people might need it to keep them sober.

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in a Supreme Being 'cannot be sustained as a distinguishing characteristic of religion.'" The passage from *Seeger* cited by the *Stafford* court stands not for the proposition that reference to a Supreme Being does not make something a 'religion', but for the proposition that belief in a Supreme Being is not a prerequisite for a religion. In fact, Douglas specifically notes Hinduism and Buddhism as religions which do not include a concept of a Supreme Being. As a result, we base our analysis upon decisions of the Supreme Court rather than upon *Stafford*. (109a)

[8] Also refusing to follow *Stafford* and adopt the sort of selective and misleading references to the A.A. literature that can be found in the instant petition, the District Court in *O'Connor* took the following quote as revealing:)

> This is the how and why of it. First of all, we had to quit playing God. It didn't work. Next, we decided that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children. Most good ideas are simple, and his concept was the keystone of the new and triumphant arch through which we passed to freedom . . .

O'Connor, 855 F.Supp. at 307, n. 6.

The fact remains that the Twelve Steps of A.A. is a program of indoctrination which methodically induces its participants to understand their problems in theistic terms, to pray to "God" and to surrender their wills over to that "God".

The primary problem with the Probation Department's argument is that it would guarantee the government's ability to circumvent the Establishment Clause in every challenge to state-endorsed religious indoctrination. If states and municipalities were permitted to use traditionally religious terms simply on their claim that such terms are not to be taken literally, but as mere metaphorical tokens, then accountability under the First Amendment would become impossible. *See, e.g., Robinson v City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), which, rejecting a request to go behind the objective[9] significance of a traditionally religious symbol, observed that an argument which would discard the objective standard "could always 'trump' the Establishment Clause." *Id.*

The Probation Department's argument, with its proffered interpretation of "God" and "prayer" as state-of-the-art terms within the treatment industry, similarly asks that the objective standard be discarded and that plainly religious language not be taken at face value. At the very least, however, the First Amendment must forbid government from using language conventionally understood as religious as a tool for social engineering. Otherwise, any governmental entity, such as Orange County's Probation Department, which has a policy of making sure people are exposed to a religiously proselytizing program, always would be able to "trump" the Establishment Clause by simply saying that when it uses the word "God" it doesn't mean God, and when it urges people to "pray to God" it really is telling them to do something non-religious.

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[9] Instead, the Tenth Circuit applied the objective standard enunciated in *County of Allegheny v American Civil Liberties Union* (492 U.S. 573) and looked "only to the average receiver of the government communication or average observer of the government action." *Robinson v City of Edmond, supra.*

Similarly, the Probation Department's Free Exercise balancing argument fails. If this Court were to approve the Probation Department's exclusive endorsement of the Twelve Steps on the theory that working them is good for certain types of people because "God" has a therapeutic, non-religious significance, the variety of opportunities to "trump the Establishment Clause" would be virtually limitless. Nothing then could stop any governmental entity from requiring the working of the Twelve Steps as a condition of, say, child visitation, or public or government-regulated employment, or even a student's right to remain in public school. As the New York Court of Appeals correctly observed in *Griffin*, "[a]dopting a balancing approach here would be unprecedented and raise serious implications beyond the prison context."[10]

The Probation Department's effort to psychologize, and thereby secularize, the Twelve Steps -- by deconstructing the words "God", "Him", "prayer" and "spiritual awakening" as mere metaphors -- also has the effect of degrading[11] traditional religious beliefs and insulting those who hold them. This is because the Probation Department is telling this Court (and the citizens of Orange County, New York) that the word "God" has no objective referent and that, despite one's

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[10] Free Exercise cases such as *O'Lone v Estate of Shabazz*, 482 U.S. 342; *Turner v Safley*, 482 U.S. 78; and *Pell v Procunier*, 417 U.S. 817 involve personal, rather than public, constitutional rights. In *O'Lone*, for example, a case involving a claim under the Free Exercise Clause, this Court held that a balancing is permitted between an inmate's personal right to engage in his religion's rituals and practices and the State's penological and administrative interests. Obviously, there are some religious practices that a prison simply cannot accommodate for reasons of security, order or economy. However, such balancing between personal freedoms and penological objectives has absolutely nothing to do with the Establishment Clause. Under the Establishment Clause, State institutional objectives may never justify State religious indoctrination.

[11] *See, Engel v Vitale* (370 U.S. 421), where this Court stated that a "union of government and religion tends to destroy government and to degrade religion."

religious convictions, "God" and "prayer" are nothing more than useful slogans in carrying out the County's therapeutic objectives.[12]

Whether the Court applies *Lemon* or *Lee*, the threshold question remains the same: are the Twelve Steps religious? The answer to this threshold question, as discussed above, has been obvious to American appellate courts. What the Probation Department is doing is precisely what the Establishment Clause was intended to prevent. It is perverting religious language to serve the purposes of the County.

II. It Is Well Settled That Government Coerced Attendance at Alcoholics Anonymous Meetings Violates the Establishment Clause of the First Amendment

Without any precedential authority whatsoever, the Probation Department requests this Court to (1) ignore every American appellate court that has confronted this issue[13] and (2) somehow use the *Lemon* test -- as opposed to the *Lee v Weisman* coercion test -- to reason that Orange County's policy of recommending to sentencing judges that probationers be required to attend A.A. meetings does not violate the Establishment Clause.

"Whether the key word is 'endorsement', 'favoritism' or 'promotion', the essential principle remains the same. The Establishment Clause at the very least prohibits government from *appearing* to take a position on questions of religious belief . . ." *County of Allegheny v American Civil Liberties Union*, 492 U.S. 573, 593-594 (1989)(emphasis added).

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[12] *Compare*, Bertrand Russell, *Can Religion Cure Our Troubles?*, in *The Basic Writing of Bertrand Russell*,Egner & Dennon, Eds., Simon & Schuster, 1961, at page 600: "I can respect the men who argue that religion is true and therefore ought to be believed, but I can only feel profound moral reprobation for those who say that religion ought to be believed because it is useful, and that to ask whether it is true is a waste of time."

[13] *Kerr v Farrey, Griffin v Coughlin, Arnold v Tennessee, Warner v Orange County*

Petitioner's policy of recommending to *all* sentencing courts throughout the County that anyone with an alcohol problem who is sentenced to probation should be required to attend A.A. meetings as a condition of probation, without recommending any secular alternative, makes it *appear*, "at the very least," that the State has "take[n] a position on questions of religious belief." *Id.* There is no intellectually honest way to deny this fact. As long as the Probation Department has the policy of seeing that probationers are required to attend and listen to the religiously proselytizing language of A.A., the objective *appearance* of government-endorsed religiosity is undeniable.

The *Griffin* Court had no trouble concluding that the use of the A.A. Twelve Step program by New York's prison system "as an essential component of an exclusive, compulsory attendance . . . [p]rogram violates the Establishment Clause."

Petitioner at bar, making virtually the same argument made by the New York State Attorney General in his petition for certiorari in *Griffin*, wants this Court to disregard fundamental Establishment Clause jurisprudence in order to reinstate the Probation Department's County-wide program of coerced religious indoctrination. Petitioner is asking this Court to approve a new civic religion[14] of secular spiritualism which demands recognition and acceptance of a distinction between religious belief in "God", on the one hand, and secular belief in a spiritual "Higher Power" expressed in traditional religious terms, on the other. Petitioner is essentially arguing that so long as the Probation Department (or its adjunct, such as A.A.) disclaims affiliation with any religion and insists that the word "God" can mean anything one wants it to mean, the Probation Department is free to exhort its probationers -- using traditionally religious language -- to hand their wills over to a spiritual Higher Power, to acknowledge that

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[14] *See, Lee v Weisman*, 120 L.Ed.2d 467, 482-83 (1992) where Justice Kennedy, writing for the majority, stated that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."

they are otherwise powerless, and to pray every day for the rest of their lives.

The compelling nature of this Establishment Clause violation, which distinguishes it from other, less flagrant governmental practices previously held by this Court to be violative of the separation between church and state, is underscored by the threat of imprisonment if Warner failed to "attend Alcoholics Anonymous at the direction of [his] probation officer." *See* N.Y. Penal Law Secs. 60.01(4) and 65.00(2); Veh.Traf.Law Secs. 511(2)(b) and 1193.[15] The pressure put upon Warner to attend A.A. meetings is the very sort of direct, overt compulsion which the drafters of the First Amendment found to be intolerable. The Courts below quite properly and without difficulty determined that Warner was coerced to attend A.A. meetings.[16]

Moreover, the Probation Department obfuscates the difference between the coercion which forced Warner to attend the three A.A. meetings per week with the amount of damages he may have suffered. Such an argument has no precedent in Establishment Clause

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[15] The statutory scheme is clear and straightforward. Section 65.00(2) of the Penal Law provides that if a plaintiff violates a condition of his probation the Court may revoke the sentence at any time prior to the expiration or termination of the period of probation. Section 60.01(4) of the Penal Law provides that if the probationary sentence is revoked, the court must sentence the plaintiff to a term of imprisonment or imprisonment combined with probation ("split bid"). *See also,* Veh.Traf.Law, Section 511(2)(b) (providing a sentence which includes a fine of not less than five hundred dollars; and either a term of imprisonment not to exceed one hundred and eighty days, or an additional sentence of probation); *see also,* Veh.Traf.Law, Section 1193 (providing a sentence which includes a fine of not less than two hundred and fifty dollars and not more than three hundred and fifty dollars, or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both such fine and imprisonment).

[16] No probation violation can occur without the Probation Department's determination that a violation petition should be filed. It is the fear that a probation officer will exercise his authority to file such a violation petition that operates as coercion to obey each and every directive of a probation officer. Surely the Probation Department is not suggesting to this Court that it is the sentencing court that tells the probation officer when a violation petition should be filed.

jurisprudence, and properly so. The fact that Warner was able to maintain his atheism in the face of religious indoctrination does not make his state-mandated exposure to such indoctrination constitutional.

In its opinion below, the District Court did not analyze nor rest its conclusions of law upon the three-pronged test articulated in *Lemon v Kurtzman*, 403 U.S. 602 (1971)[17] Instead, Judge Goettel based his determination upon the holding of *Lee v Weisman* that government cannot coerce anyone to participate in religion in a way which establishes or tends to establish a state religious faith.[18] This formulation of Establishment Clause law is very close to the second *Lemon* prong.

The Probation Department now argues the applicability of the *Lemon* three-prong test. This test arguably lost some of its authoritativeness in the 1980's,[19] but its force now appears to have been re-established.[20] It is Warner's position that whether or not the

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[17] This Court, in *Lemon v Kurtzman*, 403 U.S. 602 (1971), promulgated a three-pronged test for determining whether a challenged governmental act is permissible under the Establishment Clause: first, the act must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the act must not foster excessive entanglement with religion.

[18] The Second Circuit took essentially the same position. (40a)

[19] *See, e.g., Marsh v Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (applying an historical analysis to the question of whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violated the Establishment Clause).

[20] *See, e.g., County of Allegheny v ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1991) where the Supreme Court indicated a return to the three-pronged test, putting emphasis on the second prong -- the appearance or effect of endorsing religion. *See also, Chabad-Lubavitch of Georgia v Miller*, 976 F.2d 1386, 1392 (11th Cir. 1992); *Otero v State Election Bd. of Oklahoma*, 975 F.2d 738, 740 (10th Cir. 1992) (holding that the three-pronged test has been criticized but never abandoned); *Jones v Clear Creek Independent School Dist.*, 977 F.2d 963, 966 (5th Cir. 1992).

Lemon test is utilized the conclusion is inexorable that the practical effect of coercing probationers to work the Twelve Steps results in an unconstitutional establishment of religion prohibited by *Lee v Weisman.*

Applying the three-pronged *Lemon* test to the instant challenge, Warner first concedes that the requirement that a probationer make an effort to overcome his addiction serves a secular purpose; there is no issue with respect to the first prong of the *Lemon* test. However, Warner submits that the Probation Department's policy of using the Twelve Steps violates both the second and third prongs of the test in that a principle or primary effect of requiring attendance and acceptance of the A.A. doctrine advances religion, or at a minimum fosters an excessive, and unnecessary, entanglement with religion.

The fallacy of the Probation Department's argument lies in its treatment of the first and second prongs of the *Lemon* test as though they are interchangeable. After indicating that the "purpose" of A.A. is secular and therefore satisfies the first prong, the Probation Department pretends to address the second prong by arguing that the principle or primary effect of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse. This crafty argument restates A.A.'s professed purpose while obscuring the issue of A.A.'s effect.[21] Indeed, the Probation Department never comes to terms with the question of whether its policy of using the Twelve Steps has the effect of advancing religious belief. Its reason for avoiding this question is rather obvious.

Finally, in *Lamb's Chapel v Center Moriches Union Free School District,* 124 L.Ed.2d 352, 363 n 7 (1993), a six-justice majority observed that "we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled."

[21] It is one thing to try simply to get a substance abuser to overcome his addiction. It is quite another to get him to hand over his will to "God" and to get him to see himself as having to petition that "God" every day for the rest of his life, that is, work the Twelve Steps.

The District Court below, on the other hand, addressed this issue squarely when it determined "that sending probationers to rehabilitation programs which engage in the functional equivalent of religious exercise is an action which tends to establish a state religious faith." (94a) The District Court correctly noted that while the Probation Department may not have intended to establish a state religious faith, "the practical effect of coercing probationers into the exercise of religion is to tend towards a state-mandated and state-approved religion." (94a) The result reached by the District Court is mandated by the First Amendment. A government agency may not require anyone, including probationers, to accept the Probation Department's claim that words like "God" and "prayer" and "Him" and "Higher Power" and "spirituality" and "faith" -- as these words are used in the Twelve Steps -- have non-religious significance.

The exhortations contained in the Twelve Steps become no less repugnant to the Establishment Clause simply because the probationer might (theoretically) be told that he can interpret them in non-religious terms. The fact that a person might be able to maintain his atheism (or his particular form of religious conviction) in the face of indoctrination administered in A.A.'s anthropomorphic, monotheistic terms does not make his state-mandated exposure to such indoctrination constitutional. The Twelve Step requirement still violates the second and third prongs of the *Lemon v Kurtzman* (403 U.S. 602) test in that a principal or primary effect of requiring acceptance of the A.A. doctrine advances religion, and at a minimum fosters an excessive, and unnecessary,[22] entanglement with religion.

The Probation Department seems to argue that the specific references to "God" and "Him" can somehow be ignored and that there is nothing wrong with the State methodically inducing probationers to understand their problems in "spiritual" terms and to surrender their

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[22] The religious entanglement is "unnecessary" in the sense that the State can achieve the goal of alcohol rehabilitation without coercing individuals to practice religion. There are secular alternatives to A.A.

wills to a spiritual "Higher Power". Apart from the unintelligibility of its spiritual-but-secular "Higher Power", the Probation Department is making the constitutionally erroneous assumption that there is nothing wrong with the County dictating the terms in which human existence is to be understood or in asserting the existence of such entities as "a Spirit of the Universe underlying the totality of things." As this Court has made clear, matters such as "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" -- matters that "define the attributes of personhood" -- must never be "formed under compulsion of the State." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 2807 (1992).[23] A probationer, like any other person,[24] must be permitted to maintain the integrity of his intellect, for such integrity is essential to the preservation of human dignity and, thus, a free society.[25]

Moreover, the Establishment Clause violation does not occur solely within the confines of the mandated A.A. meetings. It is the religious foundation of the entire County program, together with the Probation Department's exclusive endorsement of it and their coercion of Warner and other probationers to participate in it, which violates the First Amendment.

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[23] *See, also, Lee v Weisman,* 112 S.Ct. at 2665, stating: "There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe."

[24] "A human being does not cease to be human because the human being is a prisoner of the state." *Ward v Walsh,* 1 F.3d 873, 876 (9th Cir. 1993) *cert den* 114 S.Ct. 1297.

[25] "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. * * * It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to the followers of the orthodox faiths." *Board of Educ. v Barnette,* 319 U.S. 624, 640-642.

Coerced[26] participation in a program based upon the Twelve Steps is considerably more than mere exposure to religious ideas or the mere use of the word "God", as the Probation Department appears to argue. It is overt religious indoctrination. To analogize it to the *Marsh v Chambers* chaplain's prayer, and to distinguish *Lee v Weisman* on the theory that adult probationers are not as susceptible as children, ignores the fact that the very premise of the Orange County program is that the participant *is* susceptible. Otherwise, the Probation Department's program makes no sense at all.

In *Engel v Vitale*, 370 U.S. 421 (1962) this Court held that New York's *recommendation* to the local school boards that they adopt the practice of daily prayer[27] violated the Establishment Clause: "We think that by using its public school system to encourage recitation of the Regent's prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause." *Engel*, 370 U.S. at 424. It is equally clear that by using its probation system to encourage working the Twelve Steps, without providing a secular alternative, the County of Orange has adopted a practice wholly inconsistent with the Establishment Clause.

Finally, the Probation Department makes a throwaway argument that if recommending attendance at A.A. meetings violates the Establishment Clause, then it mattes not if probationers are given a secular choice. (17) First, the Probation Department bases this argument upon comments made by Judge Winters in a dissent that he expressly *withdrew*. (5a) Second, this case does not involve the issue

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[26] The fact that Warner had the option of forgoing probation -- for *imprisonment* (a rather silly argument) -- is of no moment. Once the County provides such a program, it must do so in a manner that does not infringe upon constitutional rights. *See*, *Board of Education v Grumet*, 114 S.Ct. at 2497, where Justice Souter, expressing the view of the majority, stated that the Religion Clauses of the Constitution "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."

[27] "This daily procedure was adopted on the recommendation of the State Board of Regents." *Engel*, 370 U.S. at 422.

of whether the Establishment Clause would be violated if the government offered a secular alternative to A.A. Third, an argument could be made that whether offering an alternative would comport with the Establishment Clause would depend upon how it was offered. If the Probation Department offered A.A. as one of a number of acceptable treatment programs without expressing any preference for A. A. over the others, then it could be argued that the Department has fulfilled its duty of neutrality on matters of religious belief.[28]

III. The Department of Probation Is Constitutionally Responsible for its Policy of Requiring Probationers to Work Through the Twelve Steps of A.A.

A. Foreseeability is a Question of Fact

The Court of Appeals below correctly applied the principle enunciated in *Malley v. Briggs*, 475 U.S. 335, 334 n. 7 (1986) that defendants sued under Section 1983 are "responsible for the natural consequences of [their] actions". Any assertion by Orange County that the imposition of Warner's sentence necessarily broke the "causal chain" is "inconsistent with [this Court's] interpretation of Sec. 1983." *Malley v. Briggs*, 475 U.S. at 344 n. 7. The foreseeability of the sentencing court's adoption of the Probation Department's recommendation that Warner attend A.A. "is a question of fact" (32a) which was properly determined by the District Court and properly reviewed and affirmed by the Court of Appeals.

B. The Finding of Foreseeability is not Clearly Erroneous

There is no basis for setting aside the Second Circuit's determination that, "[g]iven the neutral advisory role of the probation officer toward

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[28] By analogy, there is no question that the State can require all children be educated. It does not violate the Establishment Clause for the State to indicate that this requirement might be met by attendance at parochial schools, rather than the secular public school.

the [sentencing] court, it is an entirely 'natural consequence[]'. . . for a judge to adopt the [Probation Department's] recommendations as to a therapy provider without making an independent investigation of the qualifications and procedures of the recommended provider." (31a-32a) Anyone familiar with our criminal justice system knows that "[s]uch action by a judge is neither 'abnormal' nor 'unforeseen'." (32a)

Based upon the *undisputed* evidence, the Probation Department's "recommendation that Warner be required to participate in A.A. therapy was unquestionably made pursuant to a general policy." (27a-28a) The Probation Department promulgated the use of A.A. as a condition of probation to every criminal judge in Orange County whenever the prospective probationer's use of alcohol was an issue. No court ever ordered the Probation Department to make A.A. one of its standard conditions for probationers with alcohol problems. There is also no dispute that it was the Probation Department's policy to use the Twelve Steps of A.A. to monitor probationers and that this policy was not forced upon the Probation Department by any criminal judge. As stated by the District Court, "the idea of requiring [Warner] to attend A.A. as a condition of probation originated with the Probation Department, not with the judge." (92a)

Indeed, the *undisputed* facts confirm the Second Circuit's observation that a sentencing court's "adoption of the probation officer's recommendation is particularly likely when the recommendation deals with a provider of therapy" and that "courts generally rely heavily on [such] probation department recommendations." (32a) The record shows that the Probation Department initiated the idea of requiring A.A. without ever consulting or seeking permission from a single criminal court judge. No court ever issued an order directing the Probation Department to use the Twelve Steps to monitor its probationers or to direct probationers who might be "13-Stepping" to attend Step meetings. In fact, the record is devoid of any proof that there was a single criminal court in Orange County which even knew what the Twelve Steps are or that the Probation Department was using them.

But *if* Warner's sentencing judge *had* questioned the Probation Department about the nature of A.A., the Department would have told that judge that A.A. is *not religious*, since this is the position the Department *has always taken and continues to take* in the instant petition. Thus, implicit in the County's superseding cause theory is the untenable, wholly unrealistic, assumption that a sentencing judge would go behind the Probation Department's self-serving description of A.A. and make further inquiries elsewhere. This is why there is no substance to the County's complaint that the Second Circuit's decision implies that sentencing courts merely "rubber stamp" Probation Department recommendations.[29]

"Findings of fact . . . shall not be set aside unless clearly erroneous . . " Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer* City, 470 U.S. 564, 572 (1985). The salient factual finding below -- that there was "a high likelihood that a judge would follow" the Probation Department's standard A.A. recommendation -- was based upon an uncontroverted record and was definitely not "clearly erroneous". (32a-33a) The requirement that Warner attend A.A. was the result of the Probation Department's long-standing, systematic *and exclusive* use of the Twelve Steps throughout Orange County, *not* the exercise of an individual sentencing judge's informed discretion. As stated by the District Court:

> Even though technically it is the judge, not the Probation Department, that imposes conditions of probation, in reality the Probation Department was responsible for Warner's having to attend A.A. The Constitution deals with realities, not technicalities.

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[29] Of course, even if a sentencing judge decided to attend an A.A. meeting himself -- just to make sure he wasn't being a "rubber stamp" -- that judge, just like Warner, would be told by the A.A. members that the Probation Department was right and that A.A. is *not* religious. The sentencing judge would have to go further and sit in on sessions like the ones between Terwilliger and Warner, in which Terwilliger accuses Warner of "13-stepping" and directs him to go to Step meetings. That judge would also have to read the A.A. literature.

(92a) The Probation Department's contention to the contrary amounts to nothing more than a factual argument already rejected by the courts below.

C. The County's Distortion of the Sentencing Process

The County's factual argument is also misleading. In its Petition, the County states that the issue of foreseeability "should have been framed" by the lower courts "as whether it was foreseeable that a ten-year avowed atheist who had attended four (4) or five (5) A.A. meetings, some of which were held in churches and each of which began and ended with a prayer, would have voiced some objection, either at the time of sentencing, or within the time-frame allowed to appeal from a sentence." (9-10) Nothing in this record, however, even *suggests* that the Probation Department, when it made its recommendation to Warner's sentencing judge, had any notice, actual *or* constructive, of either Warner's atheism or his observations at the A.A. meetings he attended.

In the same vein, it is misleading for the County to state that the Probation Department's recommendation to the sentencing judge was that "Warner *continue* as a condition of probation his previously voluntary attendance at A.A." (27) This, too, is simply not true. The Probation Department provided Warner's sentencing judge with the Department's *preprinted* form entitled, "Additional Conditions of Probation Pertaining to Alcohol". This *preprinted* form, which is provided to the sentencing court whenever alcohol is an issue (Joint Appendix to Court of Appeals, 137a), states to the prospective probationer, "That you will attend Alcoholics Anonymous at the direction of your Probation Officer." (Joint Appendix to Court of Appeals, 21a) This form was attached to Warner's probation report in case the judge decided to sentence Warner to probation; *not*, as the County disingenuously states, as a recommendation that "Warner be allowed probation, rather than be incarcerated, with the 'special' condition that he *continue* his attendance at A.A. meetings" (5, emphasis added)

The County's motive for distorting the record in this manner is obvious. By creating the mis-impression that the Probation Department recommended that Warner receive probation so long as he *continued* to attend A.A. meetings, the County makes it appear as though the sentencing court was focused upon the choice of therapy provider, as opposed to the mere basic question of whether probation and alcohol therapy were even appropriate. The County obfuscates the Court of Appeals' important distinction between "the selection of a therapy provider", which was made, as a matter of county-wide policy, by the Probation Department, and the "determination of appropriateness of probation and of alcohol therapy", which is made, on a case-by-case basis, by the sentencing judge. (32a, n. 4)

D. The County's Immunity Argument

The County also makes the impermissible and meritless argument that Warner's injury was not foreseeable because the Probation Department's conduct was "objectively reasonable". *See, e.g.*, Petition, p 28 ("If it was objectively reasonable for county officials to have recommended the later-determined 'offensive' condition, how was the 'harm' foreseeable'?") This argument must be rejected for three reasons.

First, by pointing to the purported "objective reasonableness" of the Probation Department's conduct, the County is attempting to raise the defense of immunity which it *waived* by never raising the issue until its reply brief on appeal. (27a, n.1)[30] The Second Circuit, citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) rightly refused to hear the County on the question of immunity, since "[a]n issue raised for the first time on appeal is not properly before th[e] court". (27a, n.1)

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[30] Not only did the County "fail to ever raise[] a defense of immunity before the district court", its "failure to raise the issue on appeal in its initial brief deprived Warner of the opportunity to dispute the question and deprived the court of the benefit of both side's briefing." (27a, n.1)

Second, even if there had not been a waiver, the Court of Appeals, citing *Owen v. City of Independence*, 445 U.S. 622 (1980), correctly observed that the defense of immunity is not available to a municipality. (41a, n 9)

Third, the County's remarks about the "objective reasonableness" of the Probation Department's recommendation of A.A. has no bearing upon the factual issue of the "foreseeability" of the sentencing court's adoption of that recommendation. The question of "objective reasonableness" is one of law: whether the Probation Department's recommendation violated a clearly established constitutional right at the time it was issued. The question of "foreseeability", on the other hand, is one of fact: whether it was a foreseeable consequence of the Probation Department's recommendation that Warner would be required to attend A.A. as a condition of his probationary sentence. In its Petition, the County argues as though these two questions are one and the same, but, in fact, they are quite separate and distinct. The issue of foreseeability is not whether the "harm" flowing from the A.A. requirement was foreseeable, but whether the A.A. requirement, itself, was foreseeable. The latter question can be answered in the affirmative, even if the former were to be answered in the negative.

E. The Waiver and Consent Issues Were Fully Heard and Determined

The County states that the Courts below "focus[ed] exclusively" on foreseeability and proximate cause and "completely failed to apply or balance other equally important and applicable rules governing intentional torts, including superseding causes, waiver and consent." This statement is groundless. Not only was the Court of Appeals expressly mindful of these concerns, it went so far as to issue an Order of Remand (51a-53a) directing the District Court to conduct a hearing

and make specific findings so that these concerns would be fully addressed.[31]

Notably, the Court of Appeals issued its Order of Remand despite the County's failure to raise the issues of consent or waiver before the District Court and on its appeal. It was not until *after* Chief Judge Winters' dissent that the County (in its motion for *reargument*) ever took the position that Warner must have known that A.A. is religious -- a position which the District Court correctly observed is "directly contrary to [the County's] basic position that the A.A. program has no religious content." (12a)

F. The Issues on Remand Were Correctly Determined

The District Court's determination of the waiver/consent issue, like its determination of the issue of foreseeability, was in no way "clearly erroneous". Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer* City, *supra*. Indeed, the uncontroverted facts adduced at the remand hearing compelled the District Court's finding that there was no waiver or consent. As stated in the Court of Appeals' opinion, "the district court's factual findings are amply supported by the record, and its conclusion that there was no consent, wavier or forfeiture follows inevitably from these findings." (4a)

Based upon the undisputed evidence, the District Court found that, although the A.A. program is "deeply religious" (15a) and Warner perceived some of its religious aspects at the meetings he attended before his sentencing (16a), "[a]t these meetings, A.A. members attempted to convince him that their approach was not religious only 'spiritual' and that different people have different concepts as to what God is", and that "God could be anything, even a 'spoon'." (14a-16a) Although this "didn't make sense" to Warner at the time, he "wanted

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[31] The Court of Appeals explained that it "remanded to the district court for factual findings on these issues, and the district judge's findings dispel those concerns." (4a, n. 1)

to give Alcoholics Anonymous a fair hearing in [his] mind", and eventually "[c]oncluded that the organization of Alcoholics Anonymous lies when they say that they are not religious." (March 10, 1994, Oral Deposition of Robert Warner, pages 92-93)[32]

The uncontroverted proof at the remand hearing showed that it was not until long after Warner's sentencing, when his probation officer began directing him to obtain a sponsor and to attend Step meetings, that Warner "bec[a]me fully aware of the religious intensity of the step meetings." (14a) The District Court found that Warner "tried to reconcile his own perceptions with what others were telling him, but he gradually decided that they were wrong and were attempting to trick him." (15a)

There is no basis in the record to upset the District Court's determination that it was "[o]ver a period of two years" that "Warner ultimately became convinced that the A.A. program was religious, and that he was being subjected to religious indoctrination" (16a) and that Warner, therefore, did not knowingly or voluntarily waive, or in any other manner relinquish, his Establishment Clause right at the time of his sentencing or within the time he could have taken an appeal.

G. The County's "Independent Cause" Argument is Illogical

The County argues that "the judicial act of formalizing the [A.A.] recommendation constitutes an independent cause which supersedes the initial recommendation" of the Probation Department. (28)[33] The County therefore is forced to claim that "it was not foreseeable that Warner would not have voiced some concern" about the religious

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[32] Warner gave this testimony two and one half years *prior* to Chief Judge Winter's Dissenting Opinion, long before the issue of consent and waiver ever entered this litigation.

[33] This is assuming that the sentencing judge would not have "formalized" (28) the recommendation if Warner had objected to it.

nature of A.A. "after having voluntarily attended four or five A.A. meetings" before the date of his sentencing. (28) But, by making this latter claim, the County *contradicts* its main position that A.A. is not "sufficiently 'religious' to trigger the Establishment Clause of the First Amendment" (11)

On the one hand, the County argues that simply by attending a mere four or five A.A. meetings, *even without the benefit of the A.A. literature contained in this record*, Warner *must* have realized that the A.A. disclaimers about the program's religiosity were untrue.[34] On the other hand, the County points to the purportedly "flexible nature of A.A. and its accommodation of various spiritual and non-spiritual philosophies" (12) to argue that "[n]o reasonable person would view referral to A.A. as a governmental endorsement of religion" (13)

Thus, in order to make the argument that the judicial imposition of Warner's sentence broke the causal chain, the County is forced to assert that Warner's failure to object to (or appeal) his sentence was unforeseeable, the implication being that A.A. meetings (no matter what kind) are so blatantly religious that no reasonable person who attended them could have had any doubt about it. The problem with the County's argument is that the District Court found *otherwise*: that Warner *did* "tr[y] to reconcile his own perceptions with what others were telling him" at the meetings. (15a) As elsewhere in its Petition, the County is just rearguing facts that have already been determined below.

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[34] The District Court's December 14, 1994, finding at trial that A.A. is, in fact, religious was based upon proof of (1) what went on in the different kinds of A.A. meetings Warner attended, particularly the Step meetings Warner's probation officer directed him to attend long after the date of sentencing, (2) the manner in which the probation officer intensified Warner's participation in the program when Warner protested, which included having Warner obtain a sponsor and work the Twelve Steps. and (3) the contents of the basic A.A. literature, including *Twelve Steps and Twelve Traditions* and *Alcoholics Anonymous* (the "Big Book"). The proof at the 1994 trial showing that A.A. is religious went far beyond what Warner observed at his first four or five voluntarily attended meetings.

H. Conclusion

The County's self-contradictory arguments also, in effect, ask this Court to sanction a county-wide establishment of religion that could never be remedied except on a case-by-case basis by probationers who have the courage, strength of conviction and financial resources to make individual motions to their sentencing courts. What makes matters worse is that so long as a probation department immediately offers an alternative to A.A. whenever an individual probationer objects to his sentencing judge (like the Probation Department did in Warner's case), and that judge thereby declares the probationer's objection moot (as did Warner's sentencing judge), the government's *systemic* constitutional violation could never be addressed.

It would be analogous to requiring the school children in *Engel v. Vitale* to suffer through daily classroom prayer sessions unless and until they mustered the nerve to ask their teacher for permission to leave the room. Unlike the Free Exercise Clause which affords protection to the *individual*, the Establishment Clause protects the *public*, including probationers.

CONCLUSION

The Petition should be denied.

Dated: September 18, 1999

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Appendix A."Twelve Steps of Alcoholics Anonymous"

We admitted we were powerless over alcohol -- that our lives had become unmanageable.

Came to believe that a power greater than ourselves could restore us to sanity.

Made a decision to turn our will and our lives over to the care of God *as we understood Him.*

Made a searching and fearless moral inventory of ourselves.

Admitted to God, to ourselves and to another human being the exact nature of our wrongs.

Were entirely ready to have God remove all these defects of character.

Humbly asked Him to remove all of our shortcomings.

Made a list of all persons we had harmed, and became willing to make amends to them all.

Made direct amends to such people wherever possible, except when to do so would injure them or others.

Continued to take personal inventory and when we were wrong promptly admitted it.

Sought through prayer and meditation to improve our conscious contact with God, *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.

> Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

(emphasis in original)

Appendix B.
Excerpts from "Twelve Steps and Twelve Traditions"

Some of us won't believe in God, others can't, and still others who do believe that God exists have no faith whatever He will perform this miracle [of removing our obsession] . . . Let's look first at the case of the one who says he won't believe -- the belligerent one. He is in a state of mind which can be described only as sa' ıge. (Step Two TSTT 25)

Whether agnostic, atheist, or former believer, we can stand together on . . . Step [Two]. True humility and an open mind can lead us to faith, and every A.A. meeting is an assurance that God will restore us to sanity if we rightly relate ourselves to Him. (Step Two TSTT 33)

Like all the remaining Steps, Step Three calls for affirmative action, for it is only by action that we can cut away the self-will which has always blocked the entry of God -- or, if you like, a Higher Power -- into our lives. Faith, to be sure, is necessary, but faith alone can avail nothing. We can have faith, yet keep God out of our lives. Therefore our problem now becomes just how and by what specific means shall we be able to let Him in? Step Three represents our first attempt to do this. In fact, the effectiveness of the whole A.A. program will rest upon how well and earnestly we have tried to come to a 'decision to turn our will and our lives to the care of God *as we understood Him*. (Step Three TSTT 34-35)

All of the Twelve Steps require sustained and personal exertion to conform to their principles and so, we trust, to God's will. (Step Three TSTT 40)

It is when we try to make our will conform with God's that we begin to use it rightly. To all of us, this was a most wonderful revelation. Our whole trouble had been the misuse of willpower. We had tried to bombard our problems with it instead of attempting to bring it into agreement with God's intention for us. To make this

increasingly possible is the purpose of A.A.'s Twelve Steps, and Step Three opens the door. (Step Three TSTT 40)

Step Five is "the beginning of a true kinship with man and God." (Step Five TSTT 57)

Many an A.A., once agnostic or atheistic, tells us that it was during this stage of Step Five that he first actually felt the presence of God. And even those who had faith already often become conscious of God as they never were before. (Step Five TSTT 62)

This feeling of being at one with God and man, this emerging from isolation through the open and honest sharing of our terrible burden of guilt, brings us to a resting place where we may prepare ourselves for the following Steps toward a full and meaningful sobriety. Step Five TSTT 62)

Of course, the often disputed question of whether God can -- and will, under certain conditions -- remove defects of character will be answered with a prompt affirmative by almost any A.A. member. To him, this proposition will be no theory at all; it will be just about the largest fact in his life. (Step Six TSTT 63)

[I]n a very complete and literal way, all A.A.'s have 'become entirely ready' to have God remove the mania for alcohol from their lives. And God has proceeded to do exactly that. (Step Six TSTT 64)

> If we ask, God will certainly forgive our derelictions. (Step Six TSTT 65)

So Step Six -- 'Were entirely ready to have God remove all these defects of character' -- is A.A.'s way of stating the best possible attitude one can take in order to make a beginning on this lifetime job. (Step Six TSTT 65)

No matter how far we have progressed, desires will always be found which oppose the grace of God. (Step Six TSTT 66)

[T]he difference between 'the boys and the men' is the difference between striving for a self-determined objective and for the perfect objective which is of God. (Step Six TSTT 68)

The moment we say, 'No, never!' our minds close against the grace of God. Delay is dangerous, and rebellion may be fatal. This is the exact point at which we abandon limited objectives, and move toward God's will for us. (Step Six TSTT 69)

For just so long as we were convinced that we could live exclusively by our own individual strength and intelligence, for just that long was a working faith in a Higher Power impossible. This was true even when we believed that God existed. We could actually have earnest religious beliefs which remained barren because we were still trying to play God ourselves. As long as we placed self-reliance first, a genuine reliance upon a Higher Power was out of the question. That basic ingredient of all humility, a desire to seek and do God's will, was missing. (Step Seven TSTT 73)

Refusing to place God first, we had deprived ourselves of His help. But now the words 'Of myself I am nothing, the Father doeth the works' began to carry bright promise and meaning. (Step Seven TSTT 75)

The Seventh Step is where we make the change in our attitude which permits us, with humility as our guide, to move out from ourselves toward others and toward God. (Step Seven TSTT 76)

Whenever our pencil falters, we can fortify and cheer ourselves by remembering what A.A. experience in this Step has meant to others. It is the beginning of the end of isolation from our fellows and from God. (Step Eight TSTT 82)

As an insurance against 'big-shot-ism' we can often check ourselves by remembering that we are today sober only by the grace of

God and that any success we may be having is far more His success than ours. (Step Ten TSTT 92)

Prayer and meditation are our principal means of conscious contact with God. (Step Eleven TSTT 96)

It has been well said that 'almost the only scoffers at prayer are those who never tried it enough. (Step Eleven TSTT 97)

We all need the light of God's reality, the nourishment of His strength, and the atmosphere of His grace. To an amazing extent the facts of A.A. life confirm this ageless truth. (Step Eleven TSTT 98)

Now and then we may be granted a glimpse of that ultimate reality which is God's kingdom. And we will be comforted and assured that our own destiny in that realm will be secure for so long as we try, however falteringly, to find and do the will of our own Creator. (Step Eleven TSTT 98)

The object of meditation "is always the same: to improve our conscious contact with God, with His grace, wisdom, and love." (Step Eleven TSTT 100)

Now what of prayer? Prayer is the raising of the heart and mind to God -- and in this sense it includes meditation. How may we go about it? And how does it fit in with meditation? Prayer, as commonly understood, is a petition to God. Having opened our channel as best we can, we try to ask for those right things of which we and others are in the greatest need. And we think that the whole range of our needs is well defined by that part of Step Eleven which says: '. . . knowledge of His will for us and the power to carry that out.' A request for this fits in any part of our day. (Step Eleven TSTT 102)

. . . when making specific requests, it will be well to add to each one of them this qualification: '. . . if it be Thy will.' We ask simply that

throughout the day God place in us the best understanding of His will that we can have for that day, and that we be given the grace by which we may carry it out. (Step Eleven TSTT 102)

In A.A. we have found that the actual good results of prayer are beyond question. They are matters of knowledge and experience . . . Almost any experienced A.A. will tell how his affairs have taken remarkable and unexpected turns for the better as he tried to improve his conscious contact with God . . . All of us, without exception, pass through times when we can pray only with the greatest exertion of will. Occasionally we go even further than this. We are seized with a rebellion so sickening that we simply won't pray. When these things happen we should not think too ill of ourselves. We should simply resume prayer as soon as we can, doing what we know to be good for us. (Step Eleven TSTT 104- 105)

We know that God lovingly watches over us. We know that when we turn to Him, all will be well with us, here and hereafter. (Step Eleven TSTT 105)

Reviewing the first eleven Steps it is observed that "in Step Three we turned our will and our lives over to the care of God as we understood Him. For the time being, we who were atheist or agnostic discovered that our own group, or A.A. as a whole, would suffice as a higher power. . . [P]racticing these Steps, we had a spiritual awakening about which finally there was no question. Looking at those who were only beginning and still doubted themselves, the rest of us were able to see the change setting in. From great numbers of such experiences, we could predict that the doubter who still claimed that he hadn't got the 'spiritual angle,' and who still considered his well-loved A.A. group the higher power, would presently love God and call Him by name. (Step Twelve TSTT 107-109)

Practically every A.A. member declares that no satisfaction has been deeper and no joy greater than in a Twelfth Step job well done.

To watch the eyes of men and women open with wonder as they move from darkness into light, to see their lives quickly fill with new purpose and meaning, to see whole families reassembled, to see the alcoholic outcast received back into his community in full citizenship, and above all to watch these people awaken to the presence of a loving God in their lives -- these things are the substance of what we receive as we carry A.A.'s message to the next alcoholic. (Step Twelve TSTT 110)

When we developed still more, we discovered the best possible source of emotional stability to be God himself. We found that dependence upon His perfect justice, forgiveness, and love was healthy, and that it would work where nothing else would. (Step Twelve TSTT 116)

Service, gladly rendered, obligations squarely met, troubles well accepted or solved with God's help, the knowledge that at home or in the world outside we are partners in a common effort, the well-understood fact that in God's sight all human beings are important, the proof that love freely given surely brings a full return, the certainty that we are no longer isolated and alone in self-constructed prisons, the surety that we need no longer be square pegs in round holes but can fit and belong in God's scheme of things -- these are the permanent and legitimate satisfactions of right living for which no amount of pomp and circumstance, no heap of material possessions, could possibly be substitutes. True ambition is not what we thought it was. True ambition is the deep desire to live usefully and walk humbly under the grace of God. (Step Twelve TSTT 124-125)

With each passing day of our lives, may every one of us sense more deeply the inner meaning of A.A.'s simple prayer:

> God grant us the serenity to accept the things we cannot change.
> Courage to change the things we can,
> And wisdom to know the difference." (Step Twelve TSTT 125)

Appendix C.
Page 45 from Chapter Four of the "Big Book" entitled "We Agnostics"

. . . If, when you honestly want to, you find you cannot quit entirely, or if when drinking, you have little control over the amount you take, you are probably an alcoholic. If that be the case, you may be suffering from an illness which only a spiritual experience will conquer.

To one who feels he is an atheist or agnostic such an experience seems impossible, but to continue as he is means disaster, especially if he is an alcoholic of the hopeless variety. To be doomed to an alcoholic death or to live on a spiritual basis are not always easy alternatives to face.

But it isn't so difficult. About half our original fellowship were exactly of that type. At first some of us tried to avoid the issue, hoping against hope we were not true alcoholics. But after a while we had to face the fact that we must find a spiritual basis of life -- or else. Perhaps it is going to be that way with you. But cheer up, something like half of us thought we were atheists or agnostics. Our experience shows that you need not be disconcerted.

No. 99-24

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IN THE

Supreme Court of the United States

October Term, 1999

ORANGE COUNTY DEPARTMENT OF PROBATION,

Petitioner,

v.

ROBERT WARNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Reply Brief in Opposition

Orange County respectfully submits this reply brief in further support of its petition for certiorari. As demonstrated in its petition and herein, the Court should grant the petition so that several important issues may be fully examined and finally decided.

I. Warner Has Not Demonstrated That *Lee*, Rather Than *Lemon* Should Be Determinative Under The Circumstances

Warner has not fully addressed the issue which forms the basic premise underlying Orange County's petition. It is Orange County's position that the lower courts erred in applying *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*") to the exclusion of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and progeny ("*Lemon*" *or "Lemon Test*") to determine whether the Establishment Clause is offended if a municipality (through its probation department) recommends to a sentencing judge that a convicted recidivist substance abuser who seeks parole rather than incarceration participate as a condition of probation in an Alcoholics Anonymous program ("A.A."). It is clear from decisions rendered throughout the circuits that, if *Lemon*, rather than *Lee* is applied to the facts and circumstances, the result would be a finding of no Establishment Clause violation.

Contrary to Warner's assertions otherwise, courts have not under similar circumstances "uniformly" found an Establishment Clause violation. *See* Brief in Opposition at p. 8. A more correct statement -- and the premise of Orange County's petition -- is that those courts which have applied *Lee* have uniformly found an Establishment Clause violation, while courts which have applied *Lemon* have uniformly found no Establishment Clause violation.

The cases relied upon so heavily by Warner only emphasize the *Lee* and *Lemon* dichotomy.[1] For example, in *Griffin v. Coughlin*, 211 A.D.2d 187, 626 N.Y.S.2d 1011 (3d Dept. 1995), *reversed*, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), *cert. denied*, 519 U.S. 1054, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997), the lower court had applied the *Lemon Test* to find that a prison program requiring participation in Narcotics Anonymous in order to be eligible for expanded family visitation privileges did not violate the Establishment Clause. Its decision was reversed because the appellate court rejected the *Lemon Test* and, instead, analyzed the Establishment Clause issue by focusing exclusively upon *Lee*.

Under the very same facts, two courts came to diametrically opposed conclusions depending upon whether they focused exclusively upon *Lee*, or *Lemon*. The historical importance of maintaining the separation of church and state, combined with a recognition of the importance of allowing for the appropriate accommodation of religion, or spirituality requires that such haphazard results not be tolerated.

Likewise, in *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), the appellate court (applying *Lee*) reversed the lower court's decision (which had applied *Lemon* and found no Establishment Clause violation). The court in *O'Connor v. California*, 855 F.Supp. 303 (C.D. Cal. 1994) -- applying *Lemon* -- found no

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[1]Warner cites *Arnold v. Tennessee Board of Parole*, 956 S.W.2d 478 (Tenn. 1997) for the proposition that attendance at A.A. may not be used to determine whether to grant or deny parole. Brief in Opposition at p. 8 n.4. But, the court never even reached any conclusion with respect to whether: 1) A.A. is "religious"; or 2) whether conditioning parole on attendance at A.A. constitutes an Establishment Clause violation. Rather, the court remanded the matter to determine these issues, along with whether any alternative secular treatment programs were available.

Establishment Clause violation in circumstances where probationers were offered A.A. as the principal program.

Most recently -- indeed, after this petition was filed -- the United States District Court for the Southern District of New York determined that the Establishment Clause was not offended because the State of New York provided funds to a privately run alcohol crisis center on State-owned property which, *inter alia*, "encourages clients to attend regularly-scheduled A.A. meetings and familiarize themselves with its religiously-imbued "Twelve Steps."' *DeStefano v. Miller* (96 Civ. 9124) (N.Y.L.J., September 16, 1999, p. 39).

Applying the *Lemon Test* to find no Establishment Clause violation, The Honorable Colleen McMahon confirmed that there is "nothing inherently unconstitutional about involving an organization with religious ties in a government-funded program addressing social concerns . . . . relying in particular on the fact that [participants] have ultimate control over their own presence at the facility and, hence, whether they are exposed to the religious activities. *Id. See also, Board of Ed. of Kiryas Joel Village School District v. Grumet et al.*, 512 U.S. 687 (1994) (Souter, J.) (there is ample room under the Establishment Clause for "benevolent neutrality" which permits religious exercise to exist without sponsorship and without interference).

These decisions underscore the importance of determining once and for all which test, *Lemon* or *Lee*, should apply in circumstances involving government interaction, however minimal, with private organizations offering self-help or rehabilitation programs which may have a spiritual component. It also underscores the misplaced emphasis on "coercion" in circumstances where a convicted substance abuser who seeks probation rather be than be incarcerated is required as a condition of probation to participate in an effective, inexpensive and widely available self-help program.

There is no question but that A.A. meetings, which are independently run and not affiliated with any religious sect or denomination, are widely accepted as a most effective means with which to combat the disease of alcoholism. See Petitioner's Brief at p. 12-13. Moreover, members are "anonymous" and are not required to pay any membership dues.[2] *Id.*

According to Warner, the "primary problem" with Orange County's argument [that application of the *Lemon Test* would result in a finding of no violation of the Establishment Clause] is that "it would guarantee the government's ability to circumvent the Establishment Clause in every challenge to state-endorsed religious indoctrination." Brief in Opposition at p. 11. But, this is exactly what the *Lemon Test* was designed to prevent by focusing upon whether: 1) the government action at issue has a secular purpose; 2) a principal or primary effect that neither advances nor inhibits religion; and 3) does not involve excessive governmental entanglement. *Lemon, supra*, 403 U.S. at 612-13.

While protecting society from Establishment Clause violations, the *Lemon Test* recognizes and attempts to accommodate the practical and historical role that religion, including atheism, plays in individual people's lives. Responding to various situations where there are no bright lines, this Court has continually refined the *Lemon Test.*

For example, the second factor has been modified to include an "endorsement" element, *i.e.*, whether the challenged action was intended to, or has the effect of endorsing religion. *See County of Allegheny v. American Civil Liberties Union*, 492

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[2] The fact that members are not required to pay to become or remain members is significant in terms of availability to prospective probationers. Warner, himself, complained to the sentencing judge who relieved him of the obligation to attend A.A. because he would be required to spend his own money for treatment at a private facility. (116a)

U.S. 573, 592-93 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). In evaluating the "effect" of the government action, the court looks to the particular physical setting of the challenged action and applies an objective standard to determine how an average observer would perceive the government action. *Id.* The evaluation of the third prong (excessive entanglement) is an aspect of the inquiry into the second prong (effect of the government action). *See Agostini v. Felton*, 521 U.S. 203, 232 (1997).

Warner concedes that the first prong of the *Lemon Test* is not offended by recommending participation in A.A. as a condition of probation; he recognizes that the governmental act of recommending A.A. as a condition of probation has a secular purpose. Brief in Opposition at p. 17. It is clear that there is no "excessive entanglement" insofar as Orange County is not involved in any way in the funding or substance of the A.A. meetings, including which particular A.A. meetings an individual might choose to attend.[3]

However, Warner claims that analysis under the second prong of the *Lemon Test* requires a finding that the Establishment Clause has been violated. Warner claims that there is "no intellectually honest way to deny [the] fact" that recommending A.A. "makes it appear" that Orange County has approved a "new civic religion". Brief in Opposition at p.14. This argument goes too far.

In reaching this conclusion, Warner confuses the mere recommendation of Orange County with the conduct or substance of the A.A. meetings, themselves. Contrary to Warner's assertion, A.A. is not Orange County's "adjunct."

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[3] In arguing that the third prong of the *Lemon Test* is violated, Warner asserts that the governmental action is "unnecessary." Brief in Opposition at p. 18, n.22. But this is not the appropriate test.

Brief in Opposition at p. 14. The government action at issue in this case is not related in any way to the conduct or substance of A.A. meetings, but rather the mere recommendation to the sentencing judge that a recidivist substance abuser, rather than be incarcerated, be required to attend A.A. as a condition of probation. Thus, the question which must be resolved is: How would an average or reasonable person perceive such a recommendation?

The answer to this question is clear. An average person would perceive the recommendation by a probation department of A.A. attendance under the circumstances as an attempt to allow a convicted recidivist substance abuser to forego incarceration and continue to live in his community, while participating in a no-cost, effective and conveniently located self-help rehabilitation program on an anonymous basis. It must be underscored that Orange County merely recommends participation in A.A. as a condition of probation; it does not formally order it, or physically participate in or provide funds with respect to any of the individual A.A. meetings. Indeed, each probationer chooses the location of particular A.A. meetings -- each of which are run by individual members -- without any direction.

The primary problem with Warner's position [that *Lee*, rather than *Lemon*, is the correct test to apply] is that it is based solely upon the amorphous, yet absolute, concept of "coercion" as it relates to immature and impressionable school children. As such, it is inapplicable to mature adults, especially in the context of governmental administration of the criminal justice system. Yet, this forms the basis for Warner's claim: The Establishment Clause violation "is underscored by the threat of imprisonment [i.e., coercion] if Warner failed to attend [A.A.] at the direction of his probation officer." Opposition Brief at p. 15.

But, probation is a privilege not a right. A probationer is free to reject A.A., or any other rehabilitation program in favor of serving his sentence. *See Griffin v. Coughlin*, 88 N.Y.2d 674, 710, 649 N.Y.S.2d 903, 905, 673 N.E.2d 98, 120 (Bellacosa, J., dissenting), *cert. denied*, 519 U.S. 1054, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997). Moreover, a probationer who objects to attendance of A.A. on religious grounds may raise a Free Exercise claim. *See* Petitioner's Brief at pp. 19-21.

II A *De Novo* Standard Of Review Should Apply To The "Constitutional Facts" Of This Case

Warner's claim that the issues of foreseeability, superseding cause, consent and waiver are questions of fact, which may not be overruled except under a "clearly erroneous" standard, is not supported by case law. The standard of review of "constitutional facts," such as a court's findings on each part of the *Lemon Test*, is somewhat ambiguous. For example, in *Lynch v. Donnelly, supra*, this Court suggested that either a clearly erroneous, or *de novo* standard of review might apply. However, in a subsequent decision, this Court expressly held that the clearly erroneous standard did not apply to appellate review of a finding of malice under the First Amendment. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 508 (1984).

District Courts which have grappled with the issue have held that a *de novo* standard applies. *See e.g., Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1989); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 941 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688, 691 n.3 (9th Cir. 1986), *reversed on other grounds*, 485 U.S. 439 (1988); *Bender v. Williamsport Area School District*, 741 F.2d 538, 542 n.3 (3rd Cir. 1984), *vacated for lack of standing*, 475 U.S. 534 (1986). The fact that the Second Circuit remanded the matter for further factual findings

does not change the *de novo* standard of review which this Court should apply.

The issues of foreseeability, superseding causes, consent/waiver and immunity are properly before the Court. With respect to foreseeability, Orange County has demonstrated that it was not foreseeable that a ten-year self-avowed atheist, who had upon the advice of counsel voluntarily attended four (4) or five (5) A.A. meetings (some of which were held in churches and each of which began and ended with a prayer), would not have voiced some objection at sentencing or on appeal.[4] Likewise it was not foreseeable that the sentencing judge would have adopted the "offensive" condition had Warner notified him that he was an atheist. The evidence presented below makes it clear that: 1) Sentencing judges do not always accept the recommendations of a probation department (32a); and 2) the specific sentencing judge would have altered the "offensive" condition had Warner made known his objections. (JA-15a, 80a)

Likewise, the issues of whether the judicial act of imposing the "offensive" condition constitutes a superseding cause which relieves Orange County of liability, or entitles it to some form of immunity, along with whether Warner either consented to or waived his right to object to the "offensive" condition of probation are properly before the Court. These issues are discussed at length in Orange County's petition and we will not burden the Court by repeating them here.

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[4] Warner admits that during his deposition and at trial that he made it known that he had previously attended A.A. meetings because his attorney had advised him that the sentencing judge would look more favorably upon him if he could demonstrate that he was attempting to resolve his problems with alcohol. (78a)

Conclusion

For all of the reasons stated, the Petition for Writ of Certiorari should be granted so that the important issues raised herein may be more fully briefed and finally decided.

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Respectfully submitted,

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